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OVERSIGHT OF THE OPERATION OF INSPECTOR GENERAL OFFICES

HEARING

BEFORE THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

SECOND SESSION

APRIL 25, 1990

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OVERSIGHT OF THE OPERATION OF INSPECTOR GENERAL OFFICES

WEDNESDAY, APRIL 25, 1990

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in room SD-342, Dirksen Senate Office Building, Hon. John Glenn, Chairman of the Committee, presiding.

Present: Senators Glenn and Roth.

Chairman GLENN. The hearing will be in order.

We meet this morning to look into oversight of the operation of the Inspectors General offices, and we have quite a list of witnesses this morning. We have with us this morning the Honorable Silvio Conte, Ranking Minority Member of the House Committee on Appropriations. He has a time problem, and so we will let him make his statement first and I will make my opening statement second.

Mr. Conte, we are glad to have you with us this morning. Welcome, and we look forward to your statement.

TESTIMONY OF HON. SILVIO O. CONTE, RANKING MINORITY MEMBER, HOUSE COMMITTEE ON APPROPRIATIONS

Mr. CONTE. Thank you, Mr. Chairman. At the outset I want to thank you for giving me this opportunity to go on first so I can get back to my Committee on Appropriations where we have hearings at 10 o'clock.

As I look at you it brings back a lot of great memories. I was down in my cellar last night and was looking at a picture of you right after your space flight. It was taken in the House Appropriations room. Even though it was a long, long time ago, you haven't changed a bit. Unfortunately my "machine" is all broken down.

Chairman GLENN. What this proves this morning is that House of Representatives members will lie on occasion too. [Laughter.]

Mr. CONTE. Thank you, Mr. Chairman, for the opportunity to address this very distinguished Committee. I am here to speak on behalf of the Inspectors General and their jurisdictional dispute with the Department of Justice.

The Inspectors General and the problems they were created to combat have long been an interest of mine. As a member of the general court in Massachusetts back in the early 1950s I fought fraud and corruption in pension and benefit programs. I have never forgotten those experiences. It is really hard to forget about benefit payments to dental and medical programs that didn't exist, and working folks losing their retirement savings because pension plan managers were lining their own pockets.

I also know about the IGs through my work as Ranking Member on the House Appropriations Committee. That Committee, like your Governmental Affairs Committee, oversees the IGs. You could say we are the watchdogs of the watchdogs. Maybe that is why I like to bark at my own staff. The work of guys on the IG staffs, like Dick Kusserow at HHS, and Ray Maria at Labor, and William Doyle with the railroads, and Sherman Funk at the State Department is very impressive. The IGs are the Matt Dillons of our times. Perhaps they should wear uniforms like the Surgeon General.

In fiscal year 1989 the 24 presidentially appointed IGs recovered $727 million and conducted 5,639 successful prosecutions. They levied 2,851 administrative sanctions and caused 2,514 personnel actions. They made recommendations for over $4.88 billion in recoveries and restitutions, and they recommended $37 billion in inefficient use of Federal funds.

The IGs had smooth sailing until the 1989 Office of Legal Counsel ruling created havoc and diverted valuable IG resources from combating crime to fighting petty turf battles. At the heart of the struggle between the IGs and Justice Department are three fundamental issues: What was the intent of Congress when the IGs were created? What is good public policy concerning the IG's power to investigate? And lastly, what will happen if something isn't done about this ruling?

I would like to take a few moments to talk about each issue. The intent I think of Congress is clear. The IGs have independent and far-reaching powers to criminally investigate fraud and corruption associated with Federal agencies. The OLC ruling would have us believe otherwise. By coining the phrase "regulatory investigations," the IGs' authority was unjustly limited to investigation of Federal employees and Federal funds. Overnight the IGs went from generals to privates.

The act directed the IGs to prevent and detect fraud in programs and operations of Federal agencies. Logically that meant anyone receiving Federal benefits such as loans, licenses or permits, not just Federal funds or employees. Since the act didn't specify what criminal investigation could be undertaken, it is clear Congress intended for the IGs to go wherever duty called. For example, the act didn't distinguish between coal operators who don't make royalty payments and are in cahoots with Interior Department employees and coal operators who commit the same fraud all by themselves. Only the Department of Justice, not Congress, has split those hairs.

The absence of hair splitting in the act sends a clear Congressional message to the IGs: Go after all the fraud associated with Federal programs wherever it is found, conduct investigations 90 times on an agency's integrity when the integrity is compromised.

The Justice Department has also raised the specter of the IGs lusting after a program operation responsibility. I have yet in all the years I have been here to have any IG frothing at the mouth requesting program operating responsibility for their agencies. It is just a smokescreen for the real issue, what investigative authority should the IGs have?

Since 1978 Congress has reinforced its intent that the IGs have far-reaching powers by rewarding the IGs with expanded budgets and additional IGs. If Congress didn't like the results it was getting, the IG ranks would not have swollen from two in 1977 to 57 today, with a total budget of $750 million and 9,892 staff. Since Congress isn't unhappy with the IGs, maybe Justice should quit worrying and be happy.

Regarding what is good policy concerning the power of the IGs, we don't have to dig too deep to see the IGs are right for the job. They have undergone the same rigorous training that the Federal law enforcement officials go through. If the IGs don't do it, I ask you who will? And even though the FBI has the authority, the expertise, to conduct investigations, their many other responsibilities keep them from pursuing all the violations associated with Federal agencies. The FBI cannot be expected to take on the important work Congress assigned to the IGs over a decade ago.

William Sessions, Director of the FBI, recently testified before the House Appropriations Committee that, "The scope of white collar crime is such that it is impossible for the FBI to investigate all the white collar crime cases that come to our attention."

Obviously, the FBI's plate is quite full. In addition to investigating counterintelligence, kidnaping and fugitives from justice, the FBI is also fighting the war against drugs, probing the savings and loan industry, and looking into the HUD scandal.

The other possibility, the agency heads, isn't a viable alternative because even though they have the responsibility to enforce the law, they cannot be expected to identify and establish every instance of criminal wrongdoing in an agency's regulated programs, and their investigations might generate interagency conflicts.

Not using the IGs to conduct investigations of programs regulated by the Federal agencies is foolish. Their record is excellent, and most importantly, they are available.

That brings me to the last issue; what happens if the OLC ruling is left in place? It isn't a pretty picture. Much fraud will remain untouched. Our citizens will suffer while criminals celebrate their good fortune and it's all because the OLC ruling stopped the IGs from investigating crimes of vital importance to many Americans. Investigations, it is sad to say, the IGs used to conduct.

The ruling stopped investigations of federally regulated pension and welfare plans, violation of wage and hour statutes by the Labor IG, investigations of falsification of generic drugs by the HHS IG, investigations of reckless endangerment in workplaces by the Department of Energy and Labor IGs, and investigations of the falsification of passports and visas by the State Department's IG.

The problem with the IGs is like buying a watchdog to protect your property. You can choose to let the dog instinctively do its job, or remove its teeth and lock it in the basement. The OLC ruling removes the teeth from the watchdogs, and we better respond before it locks them up in the basement. And that is why I am pleased to join with one of the finest Senators that ever served in the Senate, the distinguished Chairman, to introduce a bill bringing a timely end to the squabbling and getting the IGs back to work as the Federal watchdogs with teeth.

Thank you, Mr. Chairman.

Chairman **Glenn**. Thank you very much, Mr. Conte. We appreciate you coming over this morning. I have no further questions, and we appreciate your support, your efforts in this regard, and we will be working together on it. Thank you very much.

Mr. **Conte**. Thank you, Mr. Chairman.

OPENING STATEMENT OF CHAIRMAN GLENN

Chairman **Glenn**. Although the Inspector General Act of 1978 has received comparatively little public attention and credit, it has been, over the past decade, one of the real and substantive success stories of Government in fighting and rooting out fat, fraud, waste and abuse. As Mr. Conte just indicated, we can point directly to some $727 million saved, to 5,629 successful prosecutions—those are not just charges—successful prosecutions, some of which might have occurred, but the majority probably would not have occurred had it not been for the IGs. It was an experiment that worked. When it was put in effect, back in those days I hadn't been on the Committee too long, but I worked to get it in place because I thought it was a good idea. But we looked at it then as an experiment, would it work or would it not, and it worked. Sufficiently so that we expanded the IG Act in 1988 to include more agencies and branches of Government.

For 11 years prior to March of 1989 IGs doggedly pursued under the Inspector General Act fraud, waste and abuse "relating to the programs" of the individual departments. The IG Act's broad authority led IGs to conduct thousands of investigations which resulted in thousands of criminal convictions in cases prosecuted by the Department of Justice.

In short, the unambiguous words of the Inspector General law worked well to provide the IGs with the necessary broad discretion and authority to conduct any investigation they believed necessary to carry out their mission.

However, on March 9, 1989, the Department's Office of Legal Counsel issued an opinion which reinterpreted the Inspector General Act and imposed a hitherto unknown limitation on IGs. According to the Office of Legal Counsel, OLC, in order to undertake an investigation the IGs must find Federal dollars being expended or a Federal employee engaged in misconduct. What the DOJ opinion leaves out are whole categories of criminal cases previously worked by IG agents: fraud relating to false certifications, and false applications for non-monetary Government benefits such as a Federal license, job, visa, passport or other benefit. It even leaves out less common but necessary investigations, such as those directed at persons impersonating agency officials.

As a result, the jurisdiction and ability of the Inspector General offices to fight fraud and investigate crime is under full scale reduction from the U.S. Department of Justice, the very agency we would expect to be most supportive of the successful IG programs. Our purpose is to catch criminals and correct wrongdoing. The IG is a help, another tool to use and to cooperate with, as I see it, not to hamstring.

The end result will be the fumbling of thousands of investigations directly affecting the health and welfare of the people of this country. With the DOJ ruling, persons who criminally certify false test results of generic drugs they seek to have licensed are now more likely to go unpunished for putting ineffective medicine in the cabinets of the American people. Workers in unsafe factories or mines may die as criminal conduct in the OSHA or MSHA programs occur. Persons fraudulently selling State Department visas will be able to do so with far less risk of investigation and interference by agents of the Government.

The OLC opinion further overturned the law by creating a type of investigation purportedly off-limits to the IG. The end result of DOJ's drawing this line in the sand has been widespread confusion which can only benefit persons intent upon breaking the law. Now, the DOJ Office of Legal Counsel has become the arbiter of what I view as a false interpretation of the Act's intentions, granting IGs authority to conduct investigations in certain cases and saying no in others. As a result, agency officials and IGs have struggled to protect ongoing investigations.

For example, the Secretary of Health and Human Services sought to protect FDA related investigations being conducted by the HHS IG by delegating the Secretary's felony investigative authority to the IG as a supplement to the IG's powers under the IG Act. However, DOJ objected to this and pressured the Secretary to rescind the delegation. Now, IGs are so desperate to protect their investigations that they are contemplating detailing their personnel to agency managers to complete the investigations, a step which could significantly undermine their independence and the mission Congress established for them.

Why now? Why does DOJ move after 12 years of excellent work by the IGs and all those thousands of cases referred to Justice which have been prosecuted? Why now? Why move after 12 years of excellent work with the IGs to so seriously limit their ability to continue?

Well, I cannot authoritatively answer that question, but it does seem to me to be a strange coincidence that DOJ would move so forcefully against the IG community after the IG Act coverage was extended to cover the Department of Justice itself, coverage very strongly fought by the Department of Justice.

We had indications to us last Fall that there could be a negotiated settlement. Mr. Funk of the Department of State, and Mr. Hodsel and Mr. Darman at OMB said they thought this could be worked out and we were moving to get a solution that was going to be satisfactory to everybody. But that just has not occurred, and that is the reason for this hearing this morning.

It is also unnecessary to have this current wrangle. The words of the IG Act which provide broad authority to the IGs to make whatever investigations they believe were necessary were crystal clear to the DOJ 3 years ago when the Department was unsuccessfully resisting the institution of an IG in the Department of Justice.

Before me in this Committee room Stephen Markman, then Assistant Attorney General of the Office of Legal Policy stated, "Extending the Inspector General Act to the Department of Justice would diffuse these responsibilities and lessen accountability. The Inspector General would have authority to make whatever investigations he or she might deem appropriate, and the Attorney General would be without authority to halt or redirect those investigations. Heads of other agencies where statutory Inspectors General already exist, of course, face similar intrusions on their authority."

Although I disagree with his tone, Mr. Markman's characterization of the IG's authority then is not consistent with the limitations Justice seeks to impose now. I also find discouraging the rather tortured approach to legislative history undertaken in the OLC opinion. Let me give a specific example. On page 7 of the OLC opinion a single sentence is selectively quoted from the Senate report which accompanied the passage of the 1978 Inspector General Act, "The Inspector General's focus is the way in which Federal tax dollars are spent by the agency both in its internal operations and its federally funded programs."

This alone might imply that DOJ's opinion limiting IG authority to cases where a Federal dollar is spent is correct. However, DOJ has disingenuously chosen to drop the preceding and following sentences, which thoroughly undermine the narrow point. Let me read the sentence they chose in context: "However, the Committee intends that the Inspector and Auditor General will assume a leadership role in any and all activities which he deems useful in order to promote economy and efficiency in the administration of programs and operations or prevent and detect fraud, abuse and waste in such programs and operations. The Inspector and Auditor General's focus is the way in which Federal tax dollars are spent by the agency, both in its internal operations and its federally funded programs. Such a responsibility obviously encompasses countless issues. The Inspector and Auditor General should obviously be involved in identifying patterns and perpetrators of programmatic fraud."

I have held a series of hearings in an attempt to jog the Administration into settling this OLC problem. I have subsequently written letters to all of the IGs concerning the OLC memo and other issues. These responses will be placed in the hearing record.[1]

Based on those letters we asked several of the IGs to explain in more detail the problems caused by the OLC opinion. After we hear from the IGs this morning, we will then hear from the Department of Justice. We are fully prepared to introduce legislation to overrule the OLC opinion. I still hope this can be settled without legislation.

We have already heard from Mr. Conte this morning. Our next witnesses this morning will be Mr. Richard Kusserow, IG at the Department of Health and Human Services, Mr. James Richards, IG at Department of Interior, Mr. Sherman Funk, IG at State, Paul Adams, IG at Department of Housing and Urban Development, and John Melchner, former IG at Department of Transportation.

Welcome to all of you this morning and we look forward to your testimony. Mr. Kusserow will you lead off please.

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[1] See p. 286 for the letter referred to and the responses.

TESTIMONY OF RICHARD P. KUSSEROW, INSPECTOR GENERAL, DEPARTMENT OF HEALTH AND HUMAN SERVICES [1]

Mr. KUSSEROW. Thank you, Mr. Chairman, and indeed in speaking for all of us, let me say that we are most appreciative of the fact that you are holding this hearing to help clarify something that has really caused a lot of confusion in our community. And I think it is not an overstatement to say that the March 9, 1989 OLC memorandum has had a profound effect on the operations of our own Office of Inspector General at HHS, as well as throughout the IG community.

What I would like to do, with your permission, is submit my full and rather lengthy statement for the record and perhaps just highlight some points for the sake of time.

Chairman GLENN. Without objection we will do that for everyone. All of your more lengthy statements will be included in the record.

Mr. KUSSEROW. The most serious consequence to date for our Department has been already alluded to, and that is in the FDA programs, and I would like to discuss that a little bit and as we go through it, try to put it in perspective as to the effect it is having on us.

As you point out in your opening statement, Mr. Chairman, we operated for a goodly number of years without seemingly having any kind of a problem, where we pretty much knew what our job was, the program people knew what their job was, and there did not seem to be any kind of a turf issue. As you also pointed out in your testimony, there is no turf issue in our Department as of this date. In the FDA case we had the Commissioner of FDA and his successor supporting our involvement in investigations to try to clean up that agency's programs and to try to strengthen the integrity of those programs. I think that a key word that all of us sense is to provide and ensure the integrity of the programs of our respective agencies.

Since 1977 we have engaged in investigations in FDA. It has not been our largest investigative area, but it has been a significant area. It has been an area that we have been concerned about because, in fact, it effects the health and safety of the American public.

What I would like to emphasize if I could, Mr. Chairman, is the fact that I have never had an interest to operate a program of the Department and that I do not have any desire to conduct a regulatory investigation. I have not conducted a regulatory investigation nor do I intend to conduct a regulatory investigation in the future.

And perhaps it might be just worth a moment to differentiate what FDA and its investigators, which are primarily scientifically oriented, are from the work that we do, which are associated with fraud and corruption.

FDA investigators could go out to a poultry farm and try to determine what the Salmonella level was in a chicken, and in fact, if they find that that Salmonella level is threatening to public health, they can take appropriate actions and they can move to correct the problem. They might go out to a dairy farm and check and see if the milk is adulterated by pesticides, or they might go to the Port of New York and see a load of frog legs coming into the Port of New York and determine that they are not tainted. Or they might check the sulfates level in mandarin oranges that come from Taiwan, or whether there are rat feces in canned tuna fish coming from Manila. And they have the authority to take action to correct those problems.

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[1] See p. 51 for Mr. Kusserow's prepared statement.

Mr. Chairman, I will tell you, neither I nor any member of my staff would know how to do any of that stuff. The fact of the matter is I, quite frankly, would rather not even know what orifice is used to test the Salmonella level in the chicken, let alone do that kind of investigations. But when somebody comes forth and perpetrates a fraud in our programs and violates the integrity of those programs, that is a different matter. And as you pointed out, at FDA the difficulty we had, is that we had individuals in the industry attempting to get a very valuable thing, a very valuable benefit, and that is drug approval of a generic alternative to a brand name drug. As it turned out, they would in fact do almost anything to get that benefit including and not limited to committing bribes and corruption of Federal officials.

And we were drawn into that arena when Chairman Dingell of the House had brought to our attention evidence that such a problem existed with a company and certain individuals within the company, as well as allegations possibly implicating Federal officials. We proceeded to investigate and substantiate the allegations and found that FDA officials had been corrupted to approve certain drug applications, which in turn were put on the market and which were of questionable efficacy, and possibly a danger to the public.

Our investigations went along quite well with the Department of Justice, working with the United States Attorneys Office in Baltimore, but our investigation began to broaden out. We began to see that some of these companies did not even need to bribe officials, that in fact that they might be able to obtain the same benefit through criminal acts on their own such as falsifying data to support their application, fabricating the attestation of what the product can do, maybe even having product substitution, and in effect committing a fraud, and finally, it did not necessarily have to involve Federal employees in a culpable fashion, that they could be fooled. Our investigation began to move in that direction and we began to seek prosecutions in that direction.

Things were going pretty well along the line and all of a sudden the OLC memorandum was waved at the U.S. Attorney in Baltimore and there was some question as to whether we had the authority to investigate in that area once we no longer had as the focus of an investigation a Federal employee. It just does not make any sense to me.

We have been doing a lot of investigations which as a result of the Prescription Marketing Act provided new violation of law that related to people that were repackaging drugs, selling them out to the public, and in many cases paid for by Medicaid. We found also that there were rings operating in the United States that were importing steroids from Europe and distributing them among high school athletes, college athletes, and at gyms around the country and in violation of Federal law. We proceeded to investigate that.

We were doing all these investigations, but now everything is put on hold. Suddenly we are told to stop our investigations with the rescission of the Secretary's delegation—which, as you correctly pointed out, was put into effect to bolster something that did not need bolstering, and again emphasizing that here is my Secretary, along with the Commissioner of FDA, along with the general counsel, is asking us, begging us, pleading us to work in this area to protect the health and safety and our programs in the Department. When that delegation was pulled back, it basically said to us that if we in fact proceeded on the investigations, then our individual investigators could be subject to tort liability, and that they would not be defended by the United States Government and therefore at personal risk. At that point we shut down all of our investigations, and those investigations, as far as we know, Mr. Chairman, are still shut down. They have been for the past 3 months, which means that the evidence is going stale, the witnesses' memories are fading, the wrongdoers that were on notice of the investigation are able to cover their tracks, and I think there is real harm being done in that arena.

I wish I could say that the problems are being corrected. We are working very hard to try to straighten out that specific issue as to FDA—I wish I could say it was limited to that. But if you are talking about appropriated dollars and Federal employees, Mr. Chairman, I would remind you that over two-thirds of our Department are not appropriated dollars but really come from trust funds, the Social Security trust fund, the Medicare trust funds, and a number of other trust funds. Am I now to say that we cannot protect the trust funds, the Medicare program the Social Security program, or the Black Lung program which we have and which was brought into doubt with OLC memo at the Department of Labor, which has the same program.

We have, in fact, come across situations where there is question about Social Security program. If we have somebody who is smuggling undocumented aliens into the country and then goes to the Social Security Office and bribes Social Security employees to give them Social Security numbers and cards, then that would be a violation that I can investigate under OLC. But if they don't involve the Federal employee and they engage in nothing more than a fraud, that is, they either fabricate the evidence and data in order to get this foundation document, the Social Security number, then there is a question as to whether we can investigate it. Another thing is that Congress has been very concerned about especially since 1981, is about the integrity of the trust funds of Social Security, and the use or the misuse of the Social Security symbol, the logo, the name of Social Security in soliciting for funds or in advertisement. The same thing holds true for Medicare. The misuse of the Logo is unlawful and we were investigating it, but there may be a question of our jurisdictions under the OLC.

I have been the agency that has testified when Congress has had oversight hearings on this to say what are we doing to protect Social Security and its beneficiaries against this rather heinous set of cases that we have been dealing with. Suddenly now, can I investigate in that area? It seems not, for these people are not employees of the Federal Government, these are people that are doing it on their own, pretending to take on the appearance of the Federal Government, but they are not Federal employees. Do they involve program dollars? No, they involve beneficiary dollars. They are going after our beneficiaries to scare them and to take money from them. Do I have jurisdiction now? I think not, under the Kmiec/OLC memorandum.

There are a number of other areas where this has ramifications, Mr. Chairman. I don't think there is any particular mean conspiracy going on to take this investigative jurisdiction away from us, but I do think that the interpretation by the Department of Justice has in fact caused enormous harm and confusion and basically the bottom line as I read that Kmiec/OLC memorandum is that they cannot act in the mind of what Congress thought at the moment, but they can only do what it says in the law, and the law is unclear and they are moving forward. If you take that on face value, then basically what we are saying is that this is an issue that only Congress can resolve.

With the rest of my time, Mr. Chairman, I would like to reserve that actually for questions and answers and let my brethren here have a chance at it as well.

Chairman GLENN. All right. A couple of questions here as we go. As I understand it, your people have been told that if they do not get prior approval in particular areas, you were told by the head of the DOJ Office of Consumer Litigation that continued investigation of FDA cases by Inspector General employees would place your special agents in jeopardy of personal tort liability. In other words, if there is a suit filed against you, they would not defend you, as would be the normal case; is that correct?

Mr. KUSSEROW. That's correct sir.

Chairman GLENN. I know there are a lot of examples of other cases you see as no longer within the IG's authority to investigate as a result of the OLC opinion. For instance, Kickback investigations where a medical device manufacturer is prohibited from offering kickbacks to hospitals or a physician, where Medicare ultimately covers the cost even though the manufacturer has no relationship with the Department. You couldn't look into that at all?

Mr. KUSSEROW. That seems to be also in doubt.

Chairman GLENN. Investigations into misuse of symbols, the illegal use of the term "Social Security" or "Medicare" in advertisements by private companies for their own purposes. You couldn't look into that?

Mr. KUSSEROW. That also is very much in doubt.

Chairman GLENN. Violation of the Clinical Laboratories Improvement Act, which regulates laboratories through a certification mechanism under which they must meet certain standards and permit inspections and so on. You couldn't look into any of those?

Mr. KUSSEROW. Any fraud associated with that, no, sir.

Chairman GLENN. Forging or misusing a Social Security card or account number in order to obtain a benefit other than Federal dollars, such as a credit card, a passport, employment. You couldn't look into any violations of those?

Mr. KUSSEROW. I'm aware that we might not be able to, that is in doubt as well.

If I could add just one thing, Mr. Chairman, in our Department we have all of the criminal investigators. There is no other alternative. There are no other criminal investigators in HHS except those which are employed by the Inspector General. In fact, if we do not investigate this, no one else will. Of course, Mr. Chairman, as you read through that you could almost intuitively sense that these are not the kind of cases that the FBI is interested in. We have, in our memorandum of understanding, worked these things out, and as Mr. Conte pointed out, the FBI's priorities would not extend to this level and they in fact expect that we would handle them.

Chairman GLENN. What has been the interpretation with regard to Medicare, for instance? Because I think the OLC memorandum has created confusion in that area too. For example, Medicare annually pays $400 million to $900 million to individuals when in fact health insurance companies should be paying these costs. The insurers are not receiving program dollars from the Department and so under the strict interpretation of the Kmiec decision the HHS IG would have no jurisdiction. Has that been the interpretation?

Mr. KUSSEROW. We have been challenged to that. We went to main Justice on it, and we said to them, look you referred a number of cases to us. We have a number of qui tam cases that were referred to us by the Civil Division. We are working criminal cases. We are engaged in audits. We suddenly had a challenge using the Kmiec. We got an answer back from Justice that the bottom line says we can do it.

Now, I tell you Mr. Chairman, I don't consider myself a functional illiterate, but I don't understand the reasoning behind it. But the bottom line is, in that case we can go ahead with it. I don't know why though. I don't understand it.

Chairman GLENN. Okay. We will have some more questions later.

Our next witness is Mr. Richards, who is IG at Department of Interior.

TESTIMONY OF JAMES R. RICHARDS, INSPECTOR GENERAL, DEPARTMENT OF THE INTERIOR

Mr. RICHARDS. Thank you, Mr. Chairman. I too will briefly summarize my statement and submit the full statement for the record.[1]

Dick Kusserow has talked about a lot of specifics involving the Department of Health and Human Services, which has a huge pile of money. There are other agencies that have IGs where the piles of money are not as huge, but the program managers are just as concerned about frauds committed on their programs, whether they appear to be regulatory programs or other types of programs.

The IGs basically have earned the reputation throughout the Executive Branch as being the fraud specialist. When you have frauds committed against your programs, you notify the IG and he takes over.

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[1] See p. 75.

It is bizarre and far fetched to suggest that if an IG does an investigation in an area that may appear to be a regulatory program of a fraud committed against that program that he is taking over a program responsibility. The managers of those programs don't look upon that at all as any kind of takeover, they look upon it as a necessary step to first root out the fraud, and secondly, to get advice from the IG as to how frauds can be prevented, and of how controls can be shored up to protect the integrity of the program.

If the IGs have learned one thing over the last decade or so, they have learned about how the bureaucracy works and how programs work. After all, we analyze them, take them apart every day. I think that the OLC assumption that this definition of a regulatory investigation that they have created makes the IG assume the program responsibility of operating the program is based on a fundamental misunderstanding of what it is like to operate a program.

All you need to do is read the mission statement of any complex Government program to understand what it is to operate a program as opposed to investigating allegations of fraud committed against the program. Whether the identity of the perpetrator is a person external to the agency or not connected with appropriated funds is a distinction that over the past decade or so had not been raised until the OLC opinion.

As a former Government prosecutor and a lawyer member of the IG corps, I am astounded at some of the advice that we are getting from our new general counsel, the Office of Legal Counsel. We are very uncomfortable with that. We have built up over the years a very good working relationship with the folks on the line of criminal investigations and criminal prosecutions, that is, the U.S. Attorneys. We feel very comfortable with them. They feel very comfortable with us.

Now we have basically the Attorney General's lawyers, who are traditionally more scholarly, more theoretical lawyers, who unfortunately don't have a lot of program experience, and particularly in law enforcement issues and those kinds of things, and in criminal investigations. And it makes us, frankly, very leery of going to these lawyers to ask their advice, at their invitation, if we can do this case or that case or if we can do this investigation or that.

Many of the IGs have tried to stand in the shadows on this issue because we fear what will happen to us is what happened to HHS, that suddenly our investigative program is in disarray after more than a decade of the programs relying on us as their fraud investigators.

This is the real heart of this issue. It isn't the IGs that are suffering so much. The long term effects of this will be that the programs who relied upon the IG to investigate fraud and to give advice as to how that fraud might be eliminated, or at least minimized, those are the people and those are the Federal programs that will suffer as a result of this opinion.

It isn't a personal aggrandizement issue with IGs. It isn't a power issue. We thought we were commissioned by the Congress to do a job. We have dutifully done that job over a number of years, and now we are told that some of that job that we have done is in doubt and that in the future instead of instinctively doing our job, we have to go confer with the lawyers before we do it. And as a lawyer, I find that somewhat obstructive.

What OLC has suggested to us is that, well, now before you do a case go talk to the agency lawyers. Do you remember why the IGs were given the right of direct criminal referral to the Attorney General? It was because agency lawyers, the general counsel, never let the criminal investigation get past his office. I am not saying that there is any conspiracy here, but what we are doing is taking a step back into history before the IG Act was passed, and now the agency lawyers get the first crack at your investigation and then the Justice Department specialists in OLC get the second crack. That I find very disturbing, because it sets back all of the progress that the IGs have made with their independent investigations, that is, to call them as they see them.

Let me just mention—and I elaborated in my statement—three generic areas other than those that Mr. Kusserow has talked about that we have some concern about because they appear to be outside the OLC opinion. The first one is the fraud in nonpayment of funds to the Federal Government. In other words, these are cases where appropriated funds are not flowing out to grantees or contractors or lessees. Funds are due to the Government because of timber sales, royalties on oil and gas, those kinds of things, and in our Department, the Department of the Interior, for instance, we collect between $4 billion and $5 billion a year from these activities. But technically I think you could say because the money is supposed to flow into the Government rather than flow out in appropriated funds, that these investigations would be off-limits if fraudulent underpayments were made, for instance, in royalty matters.

As a matter of fact, my office has investigated successfully two of the largest cases involving oil and gas drilling on the outer continental shelf They are not only health and safety issues, they are issues of defrauding the Government because of the fraudulent underpayment of royalties. These cases are now put in doubt because of the OLC opinion and its strict interpretation of appropriated funds.

Chairman GLENN. Are you continuing to investigate that now, or have you called that off because of the OLC opinion?

Mr. RICHARDS. Well, we are in a quandary. We are showing and telling here, and I think I have to admit that——

Chairman GLENN. But Justice has not given you specific permission to go ahead with that?

Mr. RICHARDS. No, we haven't asked can.

Chairman GLENN. So if you get a suit against you, then you don't know whether Justice is going to defend you or not, is that right?

Mr. RICHARDS. Not at this point. It is considerably in doubt.

Another area was one that Mr. Kusserow touched upon briefly—and a lot of us have done these cases over the years—that is the illegal use of the logo, of the letterhead. There was a case that—somebody impersonated an astronaut——

Chairman GLENN. Now, that is getting real bad there. [Laughter.]

Mr. RICHARDS. Yes, it is. In order to entice organizations to pay him money to speak to them. Certainly there is no connection with an agency employee or appropriated funds there, but naturally the agency turned to the Inspector General to investigate that. Those are the kinds of things that we do instinctively and the agencies refer them to us instinctively.

The third area is probably one of the most troublesome and perhaps a gray area, and that is false statements or certifications to obtain a patent, a license, a passport, other kinds of privileges of a non-monetary nature where there is no collusion with a Federal employee or use of appropriated funds. My colleagues on my left here—although I included some of that information in my statement—are more prepared to talk about specific instances and specific areas that probably now are off-limits as a result of the OLC opinion.

In conclusion, I would just like to say that it has been very frustrating and disconcerting for us to basically have to go back to the beginning to explain and justify what we have done over the past 10 or 12 years. Maybe we are victims of our own success, but we have been dutifully reporting to the Congress, to the President, to the press and to the people of this country, the taxpayers, what we have been doing. We have reported in great detail. And until this opinion came along, we thought that we were doing what we were supposed to do.

The OLC opinion has placed the question of the criminal investigative jurisdiction into real confusion and doubt, and unfortunately it does not appear that there is a negotiated solution available. We have tried that, and so we are here before you to tell you about it, to show and tell. It is painful for me to talk about investigations that I have been doing, important investigations, important to my agency, that now perhaps I have called in enemy fire on my own head by identifying these problems.

Thank you.

Chairman GLENN. Thank you very much.

Mr. Sherman Funk, IG at Department of State.

TESTIMONY OF SHERMAN M. FUNK, INSPECTOR GENERAL, DEPARTMENT OF STATE [1]

Mr. FUNK. Mr. Chairman, I first want to commend the Committee for focusing today on the single problem of the OLC opinion. There are a number of other grave issues that we are concerned with in the IG community, but I believe that this is the most troubling of them all and I believe it does warrant separate consideration and I am happy that it is being handled this way.

Without repeating what has been said before, let me just summarize by saying that there are four aspects or four spinoffs of the OLC opinion that we find most troublesome. First, both explicitly and by implication it establishes limits on the investigative jurisdiction of the IGs that I believe are arbitrary, unrealistic, and unworkable.

Second, by seeking to fix something which is not broken it violates one of the oldest and soundest principles of management. And third, it is inconsistent with the IG authorities laid out in the Program Fraud Civil Remedies Act, and to some extent, I believe, also with the Section 7 whistleblower provision of the IG Act itself. Finally, and sadly, it is driving a wedge between two natural and closely cooperative allies, the Department of Justice and the IGs.

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[1] See p. 81 for Mr. Funk's prepared statement.

Let me just comment briefly on these. Let me just say from the outset, and I think it is clear to all of us, that we recognize that the IG Act itself establishes limits on our jurisdiction. We are constrained by that law to be working on only those programs and operations of our agencies. Now obviously there is going to be debate on what that entails. This is not unusual. But I think among us we have a very clear consensus that we are not, any of us, mini-FBIs that are free at any time to range across the entire spectrum of Title 18 of the Federal Criminal Code. We can only do that within our agencies and our programs and operations relating thereto. And what bothers me is that the fact, the repeated allegations, that we are exceeding our authority is a chimera, a bogeyman raised by the OLC opinion.

Mr. Richards to my right just explained the four basic areas of dispute, and I won't repeat those, talking about fraud relating to non-monetary benefits, Fraud relating to receipts of Federal money, frauds relating to false certifications, and fraudulent impersonation of a Federal official, and misuse of a logo.

I believe if we were not to investigate any of these, we would be failing to do our job as laid out in the act, and indeed, I think we would be guilty of an nonfeasance. I might add that in this last category of the logos and impersonation of officials, I, and I suspect most of my colleagues, have not infrequently received referrals from members of Congress who in turn are passing on complaints from angry and very irate constituents about misuse of agency seals and logos. My temptation the next I get one of these to go back to the Hill, Mr. Chairman, and say, "Sorry, I can't touch this because it does not involve a direct monetary benefit." However, as long as I can lawfully do so, I assure you that I will resist that temptation.

I am bothered also by the tortuous rationale that OLC adopted to exclude these areas from IG jurisdiction. It assumed that an IG investigation of an external party—that is, an investigation of somebody who is not receiving Federal dollars or is not an employee of the Department—would be, "a regulatory investigation." And that would automatically and inherently somehow involve us in what is called a program operating responsibility, which is properly beyond our scope.

None of us would disagree with OLC that this is something that we have to avoid, because if we don't we are liable to lose the objectivity and independence that absolutely must characterize our work. But what bothers me profoundly is that, in effect, we are setting up a straw man here only to demolish it. I haven't seen a whit, not a single whit of a case. Nor do I understand any whit of difference in methodology in investigating an external party from an internal party. I believe we are setting up a straw man here without any justification.

I certainly have never converted any of my internal investigations into a program operating responsibility. I don't believe any of my colleagues have either. So the assumption that we are doing something like that is off base. Yet the suggestion persists that we are doing something fundamentally almost unconstitutional, that we are violating some basic precept of the Ig Act by going into an area and thereby gaining a program operating responsibility. When we don't do this internally, why should it be true externally?

I note also that to my knowledge there is not a single Inspector General who has any desire whatever to engage in regulatory compliance activity. There is a very real philosophic objection we have to that, and there are also some very real pragmatic objections. We simply don't have the time, nor do we have the trained people. As Dick Kusserow says, his people cannot go in and check out the contaminants in a can of salmon, and that applies to all of us.

When I was in the Commerce Department, my staff did not have the expertise to go into the fisheries area and find out some of the rather esoteric areas and arcane aspects of illegal fishing. We look at things from the standpoint of fraud against the Government. We don't want to get into the compliance business, and OLC's fear of Igs getting into the compliance business—as I noted earlier—is a classic case of fixing something that ain't broke.

Finally, it is unfortunate that the OLC opinion has resulted in a divisive Justice Department/IG environment. I don't want to magnify that out of context, because to say that we are allied to Justice understates the matter. We have a kind of a symbiotic relationship between us which is immensely valuable to the Government—to all of us in the IG community, and to Justice as well. Last year, for example, assistant U.S. Attorneys and the Criminal Division of the Justice Department, together successfully prosecuted some 5,600 criminal cases made by the IGs or made jointly by the IGs and other law enforcement agencies, usually the FBI.

In the investigative arena, we would be frozen dead in our tracks without Justice and the U.S. Attorneys. Once an indictment is sent up, for all intents and purposes, we function as an arm of an AUSA or of a trial attorney in the Criminal Division. And that is why I find it so egregious to engender some kind of split between the IGs and Justice. We literally cannot work without each other.

Also, some of my colleagues have mentioned the fear of being denied protection from Justice in the case of tort liability. Given the cost of obtaining private counsel, the size of potential judgments, this would have a chillingly repressive effect on IG investigations. As Mr. Kusserow said, that threat has already been voiced, at least orally, to a number of OIG agents.

In terms of the impact of the OLC opinion on my own shop, it would limit my authority to conduct visa and passport investigations in those cases which do not implicate State Department employees or recipients of Department funds. We could look at the latter, but we could not look at the private parties if they are not acting in collusion with our own people. In other words, we would be precluded—OLC in 1984 said indeed that we are precluded—from investigating visa and passport fraud perpetrated by external parties, including large-scale visa brokers and counterfeiting rings.

In my last semiannual report, and in my current one that is going——

Chairman GLENN. As you interpret the OLC opinion, would you be prohibited from looking into those?

Mr. **Funk**. If they do not involve State Department employees, yes, sir, it would. In fact, the OLC said so explicitly in 1984 in an earlier opinion. It said so explicitly.

It also said that the security agents of the State Department—not my people, but now part of diplomatic security—would be forbidden from having certain arrest powers unless specifically delegated.

Chairman **Glenn**. Let me follow up on that just a little. Even if there was some indication or you had information that had not been developed internally but there was a ring operating doing visa sales or passport sales or whatever outside and you thought perhaps there was a connection to the inside, you couldn't look into that to make a validation of that?

Mr. **Funk**. No, sir. What OLC did in 1984—and by implication, because they referred to it as a footnote in the 1989 opinion—OLC drew a line between malfeasance, meaning the malfeasance by Department employees who allow themselves to be bribed to otherwise be extorted to give a false visa, and fraud. They said fraud is not our job because the Congress, when they passed the Inspector General Act, did not specifically indicate that we have that kind of statutory responsibility. It simply said we investigate fraud, waste and abuse, it didn't go beyond that, and the opinion held that that kind of language was not sufficiently precise to give us a fraud parameter of investigation. We could look at malfeasance. To the life of me, sir, I do not understand the difference between malfeasance and fraud, but that is a separate issue.

My problem is this, in the case of a visa broker, that visa broker is only going to succeed at some point by either suborning a member of our department, usually through bribes, or by creating such a valid seeming series of documents as to get a visa through normal channels. In both cases it is fraud against the Government. We are losing a very material benefit and a benefit of incalculable value. As I mentioned the last time I testified before this Committee, sir, visas are going anywhere from $2,000 to maybe $20,000 a pop, and it is climbing. Passports can go considerably higher. Yet we cannot go beyond the doors of a chancery, of an embassy, or of a consulate, because that is a private party. And yet inevitably in the course of an investigation you simply cannot stop there.

To use an analogy, it would be tantamount to the Secret Service being able to investigate people who push counterfeit currency but not being able to investigate the people who print it. I think that is a fair analogy, because the fact of the matter is there is no clear demarcation in the investigation. Sooner or later they are going to come—either by suborning our people or by creating false documents—they are going to come to an embassy or consulate for a visa. Sooner or later we are going to be drawn into it. But nevertheless, the extension of the OLC opinion now and the original opinion back in 1984 applicable to State, said that we have no jurisdiction on anything unless it involves a Department employee.

The impact on my operations now is unfortunate, perhaps more than Dick Kusserow's, he has no other trained investigators. In the State Department we do have the Bureau of Diplomatic Security, and they have about 150 trained investigators, perhaps a few more than that, who are not 1811s, necessarily; they are Foreign Service, but they are trained investigators.

However, their predominant concern is with security. That is an overriding concern overseas, and properly should be. We work very closely with them jointly when working an overseas investigation. But it is very difficult to expect them to pick up a responsibility that would mean dropping the security priority, and that is just too much to ask.

When I testified before the Committee last fall—you made reference to this in your opening statement, Mr. Chairman—I said then I was hopeful that discussions underway between the PCIE and the Justice Department would develop a resolution of the difficulties arising from the opinion. By that time, by the time I testified representing the PCIE, I had met on several occasions with Mr. Barr, the Assistant Attorney General for Legal Counsel, and we had given him a paper listing what we thought were the major difficulties and resolutions of those difficulties, and those were essentially the ones mentioned by Mr. Richards earlier.

I regret there was no forward motion after that series of meetings. I think the meetings were being handled in good faith, certainly on our side and I believe on their side, but there was simply no forward motion. Later, reflecting the clear wishes of the PCIE to avoid a confrontation with Justice—none of us wanted that, for reasons I mentioned earlier—the Council voted unanimously to proceed with further negotiations. I appointed an *ad hoc* committee, including Mr. Richards and John Martin, the IG of EPA, and we met on several occasions with two Associate Deputy Attorney Generals, most recently on January 23d this year.

On February 22nd I reminded the Deputy Attorney General about a deep concern of the OLC issues and I urged very prompt action to resolve it. However, last month the status quo was remaining unchanged, I saw no sign of any motion, and, frankly, I threw in the towel.

Mr. Chairman, I am an old Washington hand and I am very reluctant to seek legislative relief from bureaucratic problems, I really am. My experience has been that legislation all too often opens the door to a host of amendments which may well create problems greater than the difficulty we were trying to correct. It is also possible that legislation may lead to consequences way beyond anything we anticipated. So I therefore am generally inclined to seek a negotiated compromise, rather than roll the dice on a new bill.

In the case of the OLC opinion however, frankly my negotiating lance has been blunted and I see no way of going further through negotiation. I am sorry. I therefore believe that legislation is required and in fact is necessary to preserve the integrity of the IG Act.

Chairman GLENN. Thank you, Mr. Funk. Senator Roth.

Senator ROTH. Mr. Chairman, if I could, I have an opening statement and I have to be on the Senate Floor at 11:00, so I would like to make a few comments at this time.

Chairman GLENN. All right. That would be fine.

Senator ROTH. I would ask that my full statement be included in the record.

Chairman GLENN. It will be included in the record.

OPENING STATEMENT OF SENATOR ROTH

Senator ROTH. Let me say gentlemen, I am very concerned about the issue that is being raised today, and I very, very strongly disagree with the idea that the Inspector General should become involved in investigations that concern the administration of the programs under the jurisdiction of the Department. As one who was a senior member of the Governmental Affairs Committee at the time that these IGs were organized, it was fully our intent to create an auditor and not a doer. So I am very concerned about the proposition that because a job of investigations is not being performed, that it falls upon the IG to undertake it.

Now, there may be some serious problems with investigations not being made by the agency. It may be because of improper policies. It may be because of inadequate resources. And if that is the case, maybe we ought to reallocate some of the resources of the IG to the agency itself.

But speaking for this Senator, it was never intended that the IG would step into the breach. I am very concerned because let's say you have a labor law to administer and to ensure that the contractors or the public are complying with it. Now, it is the responsibility of the Department of Labor to administer that law and to make whatever investigations are necessary to ensure that there is adequate compliance. If they don't do it, it is not the responsibility of the IG to move in and make those investigations. It is the responsibility of the IG to investigate and advise the Congress that the job is not being done, and then it is up to us, as well as the administrative branch, to take appropriate action.

But if the IG begins to move into making investigations that are the responsibility of the agency, then who is going to audit their activities? Do we have to create still another agency to interview and investigate?

Critically important is the independence of the IG. The job of the IG is to audit and to investigate the activities of the agency itself, and I will certainly do everything I can to prevent the IG moving into an administrative function.

I think Congressman Levitas stated the situation extremely well: "The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibilities to divide allegiances. The Inspectors General will be responsible for audits and investigations only. Moreover, the offices of IG would not be a new layer of bureaucracy to plague the public. They would deal exclusively with the internal operations of the departments and agencies. Their public contact would only be for the beneficial and needed purpose of meeting complaints about problems with agency administration and in the investigation of fraud and abuse by these persons who are misusing or stealing taxpayer dollars."

Now, I think you gentlemen as IGs of the various departments have a very, very important and serious responsibility. In some of the situations in the past, including the savings and loan, I have been disappointed, and I think it is important that you concentrate on what you were created to do, and that is to audit and investigate the adequacy of the administration of the agency. But once you start moving in and taking over some of their program responsibility, in my judgment we are losing the independence that is so critically important. If the job isn't being done, we need to know that, and then we need to allocate the proper resources so that it can be done by the agency itself. But fundamental to the whole purpose of the IG and the creation of them was independence, and nothing must be permitted to whittle away at that.

Thank you, Mr. Chairman.

[The prepared statement of Senator Roth follows:]

PREPARED STATEMENT OF SENATOR ROTH

Thank you, Mr. Chairman. I commend you for holding this hearing today on what is clearly a very important question—A questions that is a cause of great concern within a number of Federal department and agencies. That is, "what is the proper scope of an inspector general's investigative authority?"

There are really two aspects to that question. The first is, what does the present law provide? The second is, what is sound public policy? Ideally, the answer to each question would be identical. I would hope that this is the cast. However, given the fact of this dispute, and the necessity for this hearing, it may be that the law is ambiguous. In that case, if clarification is needed—either legislatively or through executive action—then it ought to be done in a way that reflects the unique role of the inspector general that Congress originally intended.

The focus of the present controversy is on a category of investigation that has variously been labeled "routine regulatory investigations" or "routine program enforcement investigations." Briefly stated, these are investigations that largely involve the alleged violation of Federal laws and regulations by private persons in a way that does not include either misconduct by a federal employees or misuse of Federal funds.

The question is, may an I.G. conduct that kind of investigation? In my opinion, the answer is—it depends.

It depends on the purpose of the I.G.'s investigation. If the purpose is to determine whether a particular regulatory program's enforcement activities are satisfactory, then such a investigation may indeed be appropriate. However, if the intent of the I.G. is to undertake a routine program of regulatory enforcement, then I believe that would be contrary to how Congress viewed the rule of the inspector general. It would certainly be contrary to sound public policy.

In a nutshell, the role of the inspection general is to review the work of others, to discover and report any problems found, to recommend corrective measures, and to make sure those recommendations are carried-out so that the problems are not repeated.

It is not the role of the inspector general to be the regulatory enforcement arm of the department or agency, in any particular program area. Regulatory investigative activities may certainly be engaged in by the I.G., but as long as the underlying purpose is to discover program weaknesses—so that corrective action may be taken. In other words, the I.G.'s investigative activities should be primarily aimed at developing a better understanding of the nature of a problem, with view toward recommending ways to eliminate it. In some instances, the recommendation may simply be that the regulatory office be given more resources for enforcement activities—but it is not the role of the I.G. office to assume responsibility for any of those activities itself.

The reason for this should be obvious—routine regulatory enforcement investigation is itself a program operation, and the I.G. act states that no "Program operating responsibility" may be transferred to an inspector general.

Think for a moment what the contrary would mean. What if an I.G. could assume the agency's on-going responsibility for investigations under some regulatory program, either by delegation or through default? In that case, who within the agency would review the integrity, efficiency, and effectiveness of the I.G.'s part of the enforcement program? Who would report weaknesses and recommend improvements? Who would send such an assessment to the agency head and to the Congress?

The answer, of course, is that no one would. There would be no one to inspect the inspector. For that is the role of the inspector general—to inspect, and to report and recommend. And then to inspect again, and if necessary, to report again—until the problem is eliminated and he or she can then look elsewhere.

But if an I.G.'s investigative resources and eaten up doing someone else's job—routine regulatory enforcement—then what kinds of programmatic weaknesses, that invite fraud and waste, are being overlooked elsewhere?

But what about those important investigations that might not otherwise be conducted unless undertaken by the inspector general's office? What if neither the agency nor the F.B.I. agrees with the I.G's investigative priorities? What if the I.G. disagrees with an enforcement policy that emphasizes building civil rather than criminal cases? What if neither the administration nor the Congress has given the regulatory office adequate investigative resources? In those instances, the I.G. can complain loudly and publicily about the problems, exposing the presumedly flawed policy. Or, in some case, O.I.G. investigators might be detailed to the regulatory office. In either event, the I.G.'s distinct role as the reviewing, reporting, and recommending authority would still be preserved.

I do not believe that Congress even intended for the office of inspector general to general to catch someone else's overflow or to assume their responsibility. I do not think we meant the I.G. to be a "BACKSTOP", A "SAFETY NET", or a "ROVING LINEBACKER". If a regulation program office drops the investigative ball, it is not the I.G.'s role to pick it up and run with it. In fact, the I.G. should really be more like the referee—blowing a whistle when a program office runs our of bounds, fumbles the ball, or violates a rule. While we might score more touchdowns if the referee can pick up a fumble and run with it, that's not the way the game is supposed to be played.

Chairman GLENN. Thank you. We will go on. Mr. Adams.

TESTIMONY OF PAUL A. ADAMS, INSPECTOR GENERAL, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT [1]

Mr. ADAMS. Thank you, Mr. Chairman.

I would like to join my colleagues in their previous comments and to synopsize my statement for your benefit and share with you a situation in our department in which we think there is serious doubt raised about my authority to do certain investigations. That involves a category of cases known as equity skimming, a situation in which we have the involvement of neither Federal employees nor dollars.

Not to belabor the point but to quickly describe it for you, it is a situation in which the Federal Housing Administration has insured a mortgage. You as the home owner permit someone else to assume that loan. That person leases the property out to another person, collects the rents, and then skims the equity, does not make the mortgage payment. That property goes into foreclosure, our Department pays a substantial claim on that mortgage, resulting in a loss to the Government. Just to restate, there is neither a Federal employee involved nor is a Federal dollar directly involved.

This is a rather significant and pervasive problem in our programs. We currently have about 200 cases awaiting investigation at various stages. I think if taken literally the OLC opinion would preclude us from investigating the cases. Once again, because of the absence of Federal dollars and the non-involvement of Federal employees.

The more damning aspect of the whole thing is the chilling effect the OLC opinion has had on the performance of my staff. They now have serious doubts about their authority to conduct such investigations. Even with all the reassurance that I have given them and provided directly to them, they still have concerns as additional events occur in the community. I continue to be concerned and believe that in the absence of some clarification, that doubt cannot be allayed and that there will be a continued chilling effect upon the staff and its performance. Recognizing all the good faith efforts made in the past by others to try to resolve the issue, I can only conclude at this point that we must seek some definitive clarification, and that appears to be through the legislative process.

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[1] See p. 91 for Mr. Adams' prepared statement.

Chairman **Glenn**. Have you refused to continue with those skimming investigations?

Mr. **Adams**. No, sir, we have not at this time. The U.S. Attorneys' Offices have continued to prosecute those cases as we bring them forward. No one has challenged us on these, but if we read the opinion in its full wording, I have serious doubts about my authority. Once again, like Mr. Richards I am potentially drawing fire to myself in connection with this category of investigations I am doing.

Chairman **Glenn**. How many cases like that have you had?

Mr. **Adams**. We have had several hundred, and the losses run into hundreds of millions of dollars.

Chairman **Glenn**. How many cases have been successfully prosecuted?

Mr. **Adams**. Over a hundred in the last 4 years, fines total in excess of $2 million.

Chairman **Glenn**. Fine. Thank you. Have you finished?

Mr. **Adams**. Yes, sir.

Chairman **Glenn**. Mr. John Melchner, former IG at Department of Transportation.

TESTIMONY OF JOHN W. MELCHNER, FORMER INSPECTOR GENERAL, DEPARTMENT OF TRANSPORTATION [1]

Mr. **Melchner**. Mr. Chairman, Thank you for inviting me here today, and I commend this Committee for taking on the very difficult issue that you have placed in front of the Committee.

The focus of my testimony will be the OLC opinion and the fact that it did provide for grandfathering in investigative authorities that were transferred into the IG organization at the time it was created. In the Department of Transportation investigative resources were shifted in from the Federal Aviation Administration, the Federal Highway Administration and the Office of the Secretary.

In November of 1989, I asked the Office of Legal Counsel what the status of those investigative authorities were. In December, the Assistant Attorney General William P. Barr, Office of Legal Counsel, did respond to my request, and I would like to quote here, because it is important to get the full context: "Subject to the caveat that this letter must not be understood as specific approval of any particular investigation or category of investigations for a particular program or operation, it is our view, that pursuant to section 9(a)(1)(k) of the Act, you possess the same broad authority to investigate fraud against DOT that the various investigative unites that the Act transferred to your office at the time of the transfer."

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[1] See p. 97 for Mr. Melchner's prepared statement.

He went on to say, "In light of this conclusion, it is unnecessary at this time to decide whether the provisions of the Act that set forth the general authority of all Inspectors General also authorize such investigations."

There are two aspects to that which I find troubling. First, the opinion did provide that I had the broad investigative authorities that were transferred in, but then cast a cloud on that positive statement by saying that the opinion was not a specific approval of any particular investigation or category of investigation or for a particular program of operation.

I can understand an OLC opinion that would caution while the authorities are broad, they are not unlimited. I cannot understand why they had to cloud the opinion with the exacting requirement that the OLC rule on each instance on a case-by-case basis. The second aspect that is troubling, and in fact has the potential for real mischief, is one in the closing paragraphs of the letter, "While it would appear that collectively the authority that transferred to the DOT IG with the various investigative units was quite broad, it is beyond the scope of this letter to discuss specifically the authority of each transferred unit. If you have any such specific questions you should raise them in the first instance with agency counsel who have expertise regarding the relevant statutes and programs."

In effect, this statement could be interpreted as giving agency general counsels the primary responsibility for interpreting what agency Inspector General's authorities consist of. I hope this is not what OLC intended, especially in the light of the current debate over whether agency Inspectors General have the authority to appoint their own legal counsels.

Chairman GLENN. Did you take that to also mean that they would have to give prior approval to any investigation that you wanted to make?

Mr. MELCHNER. If we asked them to, yes, sir.

Chairman GLENN. If you asked them?

Mr. MELCHNER. Yes.

Chairman GLENN. You didn't read into that though that you would have to ask them in every instance?

Mr. MELCHNER. That's correct.

Chairman GLENN. Okay.

Mr. MELCHNER. While it would be inappropriate for me to cite specific examples of cases that might fall outside this opinion, even with the authorities that I did get, or that existed, I do support the conclusion that there will be cases which fall outside the opinion, or most likely, as some of my colleagues have said, in some gray area in between.

I could recite the examples that we used to support the idea that we had the legislative authority, but I don't think that would add much to what my colleagues have said earlier. Such cases would be like our investigation of aviators who filed false medical statements and lied about a record of driving while impaired, or people who used falsified FAA documents to get authorities to build radio towers in the sky where no such approval had been specifically given.

In fact, that particular case attained some national notoriety. Mr. Root was the subject of the investigation. The case was in progress when I informed the U.S. Attorney that there was some cloud over the authority for me to go in there because we had not yet gotten an answer to my November request to support the authorities from the Office of Legal Counsel. The U.S. Attorney went to the Office of Legal Counsel and handled the whole matter inside the Department of Justice. We got a decision that in fact we did have the authority to investigate that case without having to separately go forward.

I do believe in every case that we handled while I was the IG at transportation we did have proper investigative authorities. However, given the caveat to the OLC opinion that I received, it strengthens the potential for challenges to IG investigative authority. If we judged wrong and some court will conclude that we did not have the investigative jurisdiction, it is possible that there could be some personal tort exposure. As more and more debate occurs over this issue and more and more attention is drawn to it, IG personnel may want to have an opinion on the propriety of their jurisdiction in each case in order to assure the Justice Department will defend them should a personal tort case be filed. This, coupled with the notion that agency general counsel should provide the initial advice, could quickly get to the heart of IG independence.

In conclusion, I hope I have provided a balanced assessment of the opinion and its impact as I saw it. Echoing Mr. Funk's views, it seems to me that this is a perfect example of nothing being broken but somebody deciding to fix it. I would urge a return to the status that existed before the March OLC memorandum, although I am not certain that we can unring that bell. Failing that, I urge this Committee to introduce legislation which would clearly and unequivocally establish the IG's independence, the right to appoint counsel, and determine the full scope of IG investigative authority.

That concludes my remarks, Mr. Chairman.

Chairman GLENN. Thank you all very much, and your statements will be included in their entirety in the record.

The IG activities since the establishment of the Act back in 1978 were never seriously objected to, as I understand it, by the Department of Justice, and there has been no Congressional objection to the activities.

What brought this up? Was it just the query that was sent over that brought it to a head?

Mr. FUNK. It was a request from the Solicitor of the Labor Department for an opinion on the legal authority of the IG of Labor to look into certain areas.

Chairman GLENN. Had this never been considered in the past?

Mr. FUNK. No, sir, not to my knowledge.

Mr. ADAMS. Not to my knowledge, sir.

Chairman GLENN. Has the current arrangement of having to clear each questionable investigation through OLC resulted in losing witness statements or evidence? In other words, has the timeliness of an investigation been interfered with?

Mr. KUSSEROW. I can speak for FDA and say yes, sir. That in fact a lot of the evidence has perished as a result of it, or it is going to be much more difficult to make a case.

Chairman GLENN. Mr. Richards, you made a point that the OLC opinion will ultimately undermine confidence in Government by rendering ineffective the drive to root out fraud, waste and abuse in large areas of Government activity.

Most of the areas you are into are areas that are not being covered by other law enforcement agencies by and large. You are to fill a gap in there, and I think you have done it very well. Who will do these things if you do not?

Let's say we passed legislation here to put the IGs out, period. Who would perform the functions you are doing now?

Mr. RICHARDS. Probably either the FBI, with its stretched resources, or nobody. Many of these so-called regulatory functions—and sometimes they are hard to define, you sort of under the OLC opinion know one when you see one, because they say they regulate the compliance by individuals external to the Government with certain rules or regulations.

But many of these regulatory—or what appear to be regulatory—functions don't consider as a part of their mission to conduct criminal investigations. Basically they are technicians. They are auditors. They are engineers. In the case of the outer continental shelf for regulating the oil and gas industry, they are petroleum engineers. They look upon their function as compliance with health and safety regulations, with operational regulations and so forth. They are people with specific expertise.

When frauds are committed, they turn to the IG. In fact, they are instructed by the departmental manual, if any employee knows about any fraud or abuse, he is to report it to the IG. Most agencies having IGs have similar instructions.

Chairman GLENN. If we didn't have the IG function and we said that we were going to put all of this on the FBI, wouldn't the FBI have to almost set up within each agency the same kind of organization that you have?

Mr. KUSSEROW. Absolutely, Mr. Chairman. The fact is if you look at the legislative history, one of the reasons why this legislation came about was the fact that the FBI was saying that they were stretched too thin and they lacked the program expertise to do each and every program of the Federal Government. The fact is, you can go further than that. If you look at the legislation, it provided for the consolidation of audit and investigative units into the Inspector General to keep away from proliferating law enforcement agencies and to have a more coordinated approach to deal with problems of an investigative nature within the agency.

So if you were to turn back the clock you would in fact start proliferating law enforcement agencies and then, in addition to that, strain the FBI, which has already had added to it over the last decade a lot of new responsibilities and a lot of new missions, and certainly included in that is the tremendously new imposition of responsibilities in the area of the war on drugs. So I just cannot imagine how you can roll back that clock.

Mr. ADAMS. Mr. Chairman, I might add, at HUD most of the investigations that are done by the FBI are augmented by my staff because they don't have the programmatic knowledge. So I am faced with the dilemma that in those situations I would be supporting an investigation with the staff that I am not otherwise authorized to do.

Mr. **Kusserow**. At the 10-year anniversary of the House side of the Inspector General legislation before Mr. Brooks, the FBI testified that 90 percent of their investigations involving fraud against the Government are joint with the Inspectors General, and stated the reason for that is precisely what Mr. Adams said, and that is that we have the programmatic expertise, and oftentimes the best combination is to have the expertise of the FBI melded with the Inspector General's expertise, and that oftentimes does occur.

Mr. **Melchner**. Mr. Chairman, there are also some very practical things here. In a regulatory agency such as the FAA, if they find for example that a particular air carrier or a particular mechanic is doing some very fraudulent things, not making a simple error or erroneously not inspecting something, but they find a pattern of activity which would indicate he is doing major falsifications on aircraft engine overhauls or whatever, they would be somewhat—let me put it this way, they would be much more comfortable coming to an agency inside the Department of Transportation and explaining what their suspicions were before they would go to the FBI. And we had very, very good working relationships with our regulatory investigators in that regard.

Mr. **Funk**. Mr. Chairman, there is a disturbing implication in the opinion and as it is being interpreted widely by other agencies, and that interpretation says, well, if we cannot use the Inspector General investigators, let's create a corps of investigators within the regulatory agency itself, and that would lead to the proliferation that Mr. Kusserow mentioned.

But it is instructive to look back at the genesis of the IG Act, and one of the clear reasons in the legislative history was the fact that there were so many investigative operations going on in the Federal Government that had no independence, that were reporting to the heads of their subordinate agencies rather than to some impartial source, and therefore things were being covered up. And that to me is a very real potential danger downstream. If we have this kind of proliferation, if we have a whole corps—aside from the sheer duplication and waste involved—if we have a whole corps of new investigative agencies set up within the existing program agencies, we are going to have the same situation which led to the rise of the IG Act.

Mr. **Kusserow**. If I may just add on top of that one point, Mr. Chairman. The problem that Mr. Funk had pointed out is that investigations' independence were impaired by the fact they were reported to program officials. There is a reason why the model that was created for the Inspectors General was that we would do the investigation and not be subject to the program people, but we would be subject of the supervision of the Attorney General. So all of our cases go to the Attorney General. We go to the U.S. Attorneys and operate our investigations under the supervision of the Department of Justice. Hence, going back to the previous point that Mr. Funk had made about the symbiotic relationship that we have. We prosecute no cases. We take our cases to the U.S. Attorney. We had 1,278 convictions produced by our Office of Investigations. Our prosecutor was the Attorney General. We cannot prosecute the cases. So to think that we are running off on our own is not true. We submit ourselves to the supervision of the Attorney General.

Chairman GLENN. Prior to the issuance of the OLC memorandum, were any of you ever advised by Justice that you were operating outside the authority given to you by the IG Act or were otherwise conducting illegal investigations?

Mr. KUSSEROW. No, sir.

Mr. RICHARDS. No, sir.

Mr. FUNK. In my case, as I mentioned earlier, there was an OLC opinion in 1984 which indicated that the then IG—this was before there was a presidentially appointed IG at State—the then IG of the Foreign Service could conduct malfeasance investigations in the visa and passport area but not fraud investigations.

Chairman GLENN. What has been your relationship with the Department since this OLC opinion?

Mr. FUNK. We have not changed, sir. We are continuing to do what we did before, working jointly with the Bureau of Diplomatic Security, INS and the DEA, increasingly DEA. That is a point which is giving us quite a bit of concern. There is so much cash, loose money, circulating in the drug area, there are literally people choking on cash, they can't get rid of it. So that the prospect of having individuals with an awful lot of money go to a Foreign Service national who is a visa clerk in the consular staff of one of our missions, who gets maybe $1,000 a year in American money, or $1,200 a year, and offering that person $2,000 or $3,000 or $5,000 for a single visa is very frightening.

Now, the only way we can find out about that is sometimes through tips from DEA, sometimes through other sources, but that means trying to find out where those people are going to go. If we wait, it is too late, you know, the visas are already issued. That is why we are trying to do some preliminary work up front.

Chairman GLENN. Yesterday the Washington Post reported that the Interior Department's Bureau of Land Management has not been able to identify and investigate fraud in the oil and gas program. Can you comment on that? What role have you played in investigating that particular issue?

Mr. RICHARDS. They were speaking of the onshore portion of oil and gas operations. The offshore oil and gas operations are not under BLM, but the Minerals Management Service. It is a quirk of history.

We did several audits of the inspection and enforcement function of the Bureau of Land Management. The Bureau of Land Management has its own criminal investigators and they are supposed to conduct investigations both on onshore oil and gas, criminal investigations of onshore oil and gas, and on Indian reservations. We have, of course, general fraud investigative authority. When we bump up against them, we sit down and talk and say, you know, who does what.

Chairman GLENN. Are you investigating these things now?

Mr. RICHARDS. No we are not, they are. They have basically claimed the turf.

Chairman GLENN. Okay. So you are not doing anything in that area?

Mr. RICHARDS. We are doing oversight. We are doing it on the outer continental shelf though. The Minerals Management Service refers cases to us. In fact, they expect us to do their fraud cases, and we do them.

Chairman GLENN. Were you told to stay out of that particular issue?

Mr. RICHARDS. Well, there was a hearing before a Special Committee on Investigations created out of the Select Committee on Indian Affairs that Senator DeConcini chaired last year, and this issue was aired about who had investigative jurisdiction. We have as a matter of comity with the Bureau of Land Management investigators, said that, if you are going along and investigating adequately, we are not going to try to get into a turf war with you. We do not go looking for fights. We have enough to do as it is. We have three other law enforcement agencies in Interior as well to co-exist with, the Park Police, the special agents of the Fish and Wildlife Service, and the special agents of the Bureau of Indian Affairs. So we have to co-exist through comity and through jawboning with one another and making accommodations when we bump into each other.

Chairman GLENN. We are going to have to move along. I appreciate your comments this morning. I am sorry Senator Roth is not still here, because while I don't want to get into a debate here with Senator Roth, I do want to point out the one area that he mentioned a couple of times, I believe, and staff, correct me if I am wrong—was the IG's not getting into administering programs within a particular department.

Well, I agree with him 100 percent in that area, but I haven't seen any evidence that the IG's are trying to get into administering specific programs. You are investigating certain programs and letting come out what comes out of that investigation. That may result in some very major changes in the administration of those programs, and should. But you don't take those programs under your wing and administer them per se. And if I interpreted his remarks improperly, please let me know here staff, because I don't want to give a wrong impression. But I also wanted to make sure that I agree completely that we don't get into the administering area with the IGs.

Mr. KUSSEROW. Mr. Chairman, maybe it would be worthwhile for us just to echo—at least let me start off, and I don't think anybody would disagree with what I am going to say, and that is, there was very little that any of us would disagree with Mr. Roth on. And that is that we are not compliance investigators. It would be inappropriate for us to be compliance investigators. We are not interested in administering the program. I will raise my hand and swear that I consider that a breach of our statue and would be going beyond the parameters set forth by law. We don't want to do that either.

What I would also say is I am not aware of anyone at this table or anyone in our community that has in fact violated that boundary. I am not aware of a single regulatory investigation undertaken by an Inspector General. If there is corruption within that process, it is entirely different, but we don't do that work. I don't think anybody would disagree with that.

Mr. **Funk**. What is alarming, Mr. Chairman, is that the sheer repetition of an alleged fact tends to become in public perception a fact, so that if people repeat often enough, "My God, the IGs are beginning to take on program operating responsibilities," somebody would say, "there must be fire where there is smoke." And in point of fact, Mr. Kusserow is exactly right. I don't know of a single case where any IG has ever decided to take on in any way, shape, manner or form, a program operating responsibility.

Mr. **Adams**. Nor do we want to.

Chairman **Glenn**. Okay. I just wanted to make clear on that. One other question. Mr. Melchner, what legal advice do you feel the DOT IG got from the Office of Legal Counsel pursuant to your inquiry?

Mr. **Melchner**. I think they made it clear that the authorities that were transferred in were broad authorities. They sort of said—and I characterized it to Mr. Funk at the time I received the opinion—you have what you have and that is all that you have, but we are not going to tell you what that is, unless you come back to us and ask on a case-by-case basis.

So again, it was good advice if they had simply stopped and said you have the broad authorities that were transferred in. It is back to the issue that the IG's office had been able to function effectively under those authorities for 12 years, under myself and my predecessors. There were no clouds on the authority. Why they had to put that exacting requirement in that we come back on a case-by-case basis just baffles me.

Chairman **Glenn**. Gentlemen, thank you very much. We may have additional questions to be submitted. We hope you could respond for the record if there are additional questions.

Our next panel is Mr. William P. Barr, Assistant Attorney General, Office of Legal Counsel, Department of Justice, and Mr. Stuart M. Gerson, Assistant Attorney General, Civil Division, Department of Justice.

Welcome gentlemen. You have been here for part of the morning's activities at least, and we appreciate your coming this morning and look forward to any testimony that you may wish to give, or to submit a longer statement for the record.

I hate to characterize Senator Roth's views off notes here, but staff has given me this, and I want to be absolutely fair about this in his absence, and let me just read this. Senator Roth's concern was the IG taking over responsibility for operating a program and that conducting a program of investigation is itself in some ways a program operation, For example, assuming responsibility for the FDA generic drug investigation program.

Okay. Fine. I am glad to read that into the record so we have it clarified.

Thank you, gentlemen. Mr. Barr, if you would lead off please.

TESTIMONY OF WILLIAM P. BARR, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE

Mr. BARR. Thank you, Mr. Chairman. I appreciate the opportunity to testify before this Committee this morning. I ask that my prepared statement be entered into the record in its entirety.[1]

The focus of this hearing is the March 1989 OLC opinion issued by my predecessor, Doug Kmiec. I believe that the opinion is right on target and properly addressed the issues that were presented to OLC, and I would like to take a moment to describe for you the background of that opinion, or at least my understanding of it.

There was a dispute between the Solicitor of the Department of Labor and the Inspector General of the Department of Labor at that time concerning the scope of the IG's authority. It was a broad issue. OLC had tried to concretize it and have the parties focus on a specific investigation and specific facts that were at issue. There was correspondence back and forth on that matter, but both parties to the dispute asked OLC to resolve the general issue of whether the IG had authority to conduct investigations pursuant to the regulatory statutes of the Department of Labor and which were investigations what were integral to the Labor Department's program.

The examples that we were told to treat as paradigmatic were, for example, investigations under the Fair Labor Standards Act and OSHA, which are statutes that are enforced by the Labor Department. There are line units there that have authority to investigation noncompliance with OSHA and the Fair Labor Standards Act and to refer matters for criminal prosecution or for civil penalties or whatever to the Department of Justice.

And the IG at Labor was taking the position that he had authority to conduct investigations under the Fair Labor Standards Act and OSHA and those kinds of statutes, and that indeed under the Inspector General Act in 1978 that he had supervisory authority over all investigations of that nature.

Because the parties asked us to resolve that issue, OLC issued an opinion which looked at the statute and the legislative history and concluded that the Act was intended to draw a distinction between investigations pursuant to regulatory statutes that are an integral part of the program of the Department and the kind of auditing and in-house investigation that was contemplated for the Inspectors General, and the basic principle was that the Inspectors General were intended to be watchdogs who oversaw the administration of the program, who investigated the agency's activities and operations and the operations of federally funded programs, and that that was the basic dichotomy drawn in the statute, and that it was not the intent of the statute to give Inspector generals a roving commission to come in and conduct investigations under regulatory statutes when they felt that the responsible Assistant Secretary was not doing a good job.

If they disagreed with the way the Assistant Secretary for Occupational Safety and Health was doing his job and felt he was not properly bringing cases that should be brought, then the IG's role is to write reports to that effect to the Secretary and to Congress and to call attention to what he believes is mal-administration of a program, it is not to step in and conduct OSHA investigations himself, and that was our conclusion.

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[1] See p. 101.

Now, I think that the line that we believed Congress was drawing in the 1978 Act is a good one and a sound one, and I think there are four basic reasons why there should be this division of responsibility. The first goes to the independence of the Inspector General. There is a lot of evidence in the legislative history that Congress was concerned that the persons who were responsible for critiquing, overseeing, finding fault with and malfeasance in a program not be involved in carrying out the program themselves. And carrying out the program includes carrying out investigations to determine compliance with a program by regulated parties.

So that if the Inspector General decided to go out and conduct OSHA investigations himself, he was then becoming part of implementing the policy of the Labor Department and lost the detachment and independence that the statute sought to preserve for him.

I think the second reason we think it is a salutary division of labor is the question of who watches the watchdog. Part of the purpose of Inspector General is to make sure that there is someone protecting the rights of the American people and making sure that Government officials do not abuse their power. And I know in private practice myself I have had occasion to raise with Inspectors General complaints I have had about the way particular Government officials are carrying out a program.

If the Inspector General was out conducting the investigation himself against regulated third parties, private citizens, there is no one watching him. There is no watchdog for the Inspector General, and that's why I think it is important that the jurisdiction generally be the jurisdiction to oversee the operations of the Department, and federally financed programs carried out by that department.

I think the third reason for maintaining this division of responsibility is coherent administration and policy in a regulatory program. All programs require that decisions be made as to allocation of resources and enforcement strategy, and that is what we pay, in most departments, assistant secretaries to do when they are operating a program. Assistant secretaries have to make decisions about what kind of offenses are going to be pursued as criminal, what are going to be pursued as civil, Whether certain kinds of deviations are going to be treated as violations of regulations and so forth, and all of these decision go into putting together a coherent and hopefully a fair policy so that people in California are treated the same way as people in New York.

When you have a roving linebacker who feels that if a case is not brought properly by an assistant secretary that he can come in and do it himself under some plenary investigative authority, that breaks down the coherence and unity of purpose of a program and results I think in the Government working at cross purposes and in some cases unfairly.

And I think the fourth reason for the division of responsibility is the question of allocation of resources. My understanding of one of the purposes here is to ensure that there are resources being used overseeing the conduct of programs in the Executive Branch to make sure that there is no malfeasance, corruption, waste, fraud and abuse in those programs. And when Congress puts money into that basket and gives resources and monies to the IG to carry out that function, it is good for Congress to know that money it is putting into that basket is going to be used for that oversight purpose, and money it puts in the assistant secretary's basket to carry out OSHA inspections is going to be used for the program. But if you break down the line between those two functions and you permit Inspectors General to go in and fill in the gaps wherever they see gaps in the program, it seems to me there is a bleeding of resources and a supplementation of resources out from the oversight function into the program itself. Now that may or may not be the proper allocation of resources in the real world, but it is not the allocation of resources that was originally determined by Congress to be appropriate.

Now, after attempting to make this distinction, which we think is the drawn in the statute and very clear in the legislative history, and doing so in a context where the specific issue was whether or not the Inspector General could carry out regulatory investigations under such statutes as OSHA and the Fair Labor Standards Act, a number of Inspectors General raised profound concerns and there was a lot of hoot and holler about it.

We asked the Inspectors General to come—and I asked the Inspectors General—to come and talk with me about the opinion in areas of concern where they felt that areas they really should be investigating would be precluded by this opinion. Very few Inspectors General took me up on this. Those that did presented some concerns which we wrote opinions about, OLC issued further opinions. In three areas we found that the issues that had been raised were clearly within the authority of the Inspector General. For example, one of the examples that was cited to us was the issue of DOT's IG and his ability to review the qualifications of pilots who have applied for pilot's licenses and to make sure that there are no false statements in those applications. And he said if we apply the OLC opinion to that then I am precluded from doing that.

We pointed out to him that our March 1989 opinion dealt with Sections 4 and 6 of the Inspectors General Act. That is the general authority to conduct and supervise investigations relating to the agency's program. We did not address part of Section 9, which is the grandfathering provision. Each Inspector General, or most of the Inspectors General under Section 9 of the Act have certain specific investigative functions grandfathered and transferred over to them, and we pointed out to the Inspector General of DOT that the very function that he was concerned about is specifically covered in Section 9 by the transfer of authority.

Now, much is made about the caveat in the letter and a lot is read into that. All we were saying there is usually OLC will deal with a specific concrete dispute, "Can I conduct this investigation against Joe Blow."

We were being asked here—because of the strident suggestions that there were a lot of investigations being shut off—we were simply pointing out that in a general sense the issue he raised generically of the ability to go in and look at these pilot applications was something that was not foreclosed by the March opinion, but indeed was specifically covered by Section 9 and we said that he had very broad authority under those functions. The caveat was simply, since you haven't asked us about a specific case we are not going to opine on a specific case, but let me tell you you have very broad authority that has been grandfathered over to you in this area. Nothing sinister should be read into the caveat.

The examples that have been provided us to date by the Inspectors General have not proved to be difficult from our standpoint, and so far in three areas we found that Inspectors General clearly have authority to act.

Now, much has been made of this concept of fraud against the agency or fraud against the program, and this has been thrown up as you are precluding us from engaging against activity that constitutes fraud against an agency program. Well, I am skeptical of that very broad concept because a lot of what I see being called fraud against an agency program is simply another way of saying noncompliance with a regulatory program. It is very hard to conceive of situations that constitute noncompliance with most regulatory programs that don't involve, arguably, something that we might also call fraud against the program. If EPA issues a license, a water permit under the Clean Water Act saying you can discharge so much into the water and that is how much you can do under this permit and someone violates that, is that fraud against the program because there are false statements involved, or is that noncompliance with the EPA Clean Water Act regime that is in force and there is a specific enforcement unit in EPA that is supposed to go out and measure that and determine how that is to be handled.

So virtually any instance of noncompliance with a regulatory program can be referred to as a species of fraud against an agency. I am not talking specifically here about the tax statutes because they are sui generis and they have their own specific provisions, but conceptually, for example, is claiming a deduction or a credit you are not entitled to on your income tax fraud against the agency? And if it is, does that mean the Inspector General can audit and discipline a taxpayer rather than the IRS that is charged with doing that? The same is true with OSHA action, FLSA, most regulatory programs instances of noncompliance involve some species of misstatement that can be characterized as fraud.

Now, I did have discussions with Sherman Funk and I thought they were quite profitable and they helped me understand where the real issues were, and my recollection of those discussions was they basically ended up where it seemed to be one big question mark. And that is, are there instances of fraud against an agency which are not the kind of activity for which there is an investigative program in a compliance unit? That is, it is not an integral part of the program to go out and police those kinds of, quote, "fraud," so that there is in fact a gap there and there is no compliance unit that has statutory responsibility for policing that conduct.

And my view is that if someone can come and show me that species of fraud, then OLC will be glad to address the issue of whether or not that is within the jurisdiction of the IGs. Now, there have been some examples thrown out this morning that I have not heard of before because, as I said, a lot of the IGs were skeptical about coming to us and raising any concerns they had, and we would be glad to look at them if they would like.

But I think a basic question that has to be asked is, is there such an animal out there, and if so, what is the best way of addressing it? In fact, I think there are basically 3 issues at this stage in my own mind. I think that the basic principle is that the line is a good one and it is a distinction that should be kept. Now, if someone can show that there are a segment of investigations that are not being done, that it doesn't make sense for the FBI to do them, that there is a special reason for the IGs to do them or that they are only the available resources and that it is a kind of fraud that does not supplant the enforcement program of the agency, and I think we should take a look at that, but the answer is not to throw out the basic distinction, the answer is to look at each of these cases that are brought up and see, A, do they fall into the jurisdiction of the IG; and B, if they don't fall into the jurisdiction of the IG what is the best way of dealing with them? After all, the IG Act is somewhat of a patch quilt because it does give certain IGs specific authorities in Section 9 that others don't have.

I think the second basic issue is this idea of a chilling effect of having a line. Well, I'm not very sympathetic to that. Most people in Government have to operate with lines, and I think the fact that just because there is a line that generates questions is not a reason to do away with the distinction and the line. I think my suspicion is that the overwhelming majority, 99.9 percent of the issues confronting the IG clearly fall on one side of the line or the other, and like most Government officials, where this is a question I don't consider it to be that substantial a burden to have to go and seek legal counsel. Everyone else in Government has to do it.

Now, OLC has not set itself up as the arbiter of all these issues. Our role is if someone comes and asks us a question, if Executive Branch officials come and ask us a question, we will give them an opinion. They are free to go to their own lawyer. If they disagree with the opinion they get from their own lawyer they are free to appeal it and come to us. We are not saying we have to approve these things on a case-by-case basis. We are saying in a close question if someone feels uncomfortable about their authority we would be glad do give them guidance.

Chairman GLENN. But will you commit to defending anybody who has a charge brought against them though pursuing what they think is their proper action under the IG Act?

Mr. BARR. Well, I have never suggested otherwise, but I think Stu Gerson would be better to answer that question. That really doesn't fall into my——

Mr. GERSON. The answer is yes. I will talk about it in more detail when my turn comes.

Mr. BARR. I am generally sympathetic though that it would be a good idea perhaps to look at the question of how to eliminate any adverse consequences that come up through a step over the line in a close case. In other words, I think the question of distinction in authority should be preserved. It is very important that the IGs have their work to do and the agency officials that are carrying out a regulatory program have their work to do. And that is a distinction that should not be fuzzed, but in a close case where there is some inherent fuzz and someone does step over the line, or at least some judge down the road decides at the beckoning of some private party that the IG has gone across the line, I think it is a fair point that maybe we should look at making sure that in those cases that the IG is insulated, that there is no chance he is operating without authority, and that whatever fruits of that investigation and ultimate conviction are preserved. I think that is a fair point, but that doesn't mean that we should do away with the line, and try to draw as clear a line as we can.

I think the third issue is a question of resource allocation. A lot of the examples that were discussed with me by IGs really don't relate to authority, they relate to resources. In fact, if you look at page 3 of Dick Kusserow's statement, very interesting on the FDA issue. I don't read it as disputing the fact that the FDA has criminal enforcement authority precisely over these generic drug cases. That is part of their regulatory statute and they have the authority to go out and conduct criminal investigations.

What Dick was saying was I have the skilled criminal investigators and they don't have any. And you run across that quite frequently. We also heard it from Sherman Funk.

There are two different statutes on visa fraud. One statute says that employees of the State Department commit a crime when they engage in fraudulently procuring or producing a visa, and the other one has to do with private parties, making that a felony. And the Bureau of Consular Affairs in the State Department has the authority to go out and enforce the law that is directed at non-employees, and Sherman Funk's operation has responsibility for conducting it where State Department employees are involved or colluding with outsiders. But I understood Sherman to say this morning that, "Gee, I have all the skilled criminal investigators and the Bureau of Consular Affairs is stretched pretty thin on providing security, and even though it is their authority, it doesn't make much sense in the real world for me not to be using my guys in those kinds of investigations."

I think those are really questions of resource allocation. There is no question that FDA or the Bureau of Consular Affairs has the enforcement responsibility, but the IGs come and say, "Look, I have all of these thoroughbred investigators that are crackerjacks and I should be using them in those cases."

Well, I think there is currently flexibility to do that, but I think conceptually those resources should be subject—should be detailed and made subject to the authorities that have the responsibility for carrying out that program. So, for example, the proper way to do it conceptually would have been for Dick Kusserow to detail his investigators to the FDA Commissioner if they are spare resources that can be used in FDA investigations, not to take over the investigation himself. But there are other devices that could be used to make those resources available.

But I think those are basically the three issues as I see it in application of the Inspector General Act in a way that still preserves a fundamental distinction that I think is important to the operation of Government generally.

With that I will stop.

Chairman GLENN. Thank you. Mr. Gerson.

TESTIMONY OF STUART M. GERSON, ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE [1]

Mr. GERSON. Well, you have just heard, Senator Glenn, from our professor of aerodynamics, if you will. I am the guy whose troops fly these planes. In that context, it is clear that the Civil Division in particular, and the Justice Department as a whole, and the Inspectors General are functioning supportively and well and that each of these components is acting upon a firm commitment of fighting fraud wherever it might be found. I think that is important to note. I will return to that and document it.

I do want to make some mention of the practical effect of the OLC opinion, and suggest that its critics at once are making too much of it at the same time as they are making too little of it. They make too much of it because it is clear that at least as far as the Justice Department is concerned the IGs are being deflected from few if any cases in fact, and that all cases are being investigated by one or more appropriate agencies.

They make too little of the opinion letter in the sense that they suggest that is the product of a mere turf battle. It is, as was suggested in Senator Roth's testimony, and as Mr. Barr has just described in some detail, a matter of the intent behind the law, what this body originally intended for the IGs to do. And while this body can change or expand that law to satisfy its concerns and the concerns of various Inspectors General, one ought to recognize that that may be at odds with the original Congressional purpose in setting up independent Inspectors General. This issue of who watches the watchdogs is not an insignificant one and it does have practical effect. We are concerned about it in the Justice Department as well, because we think that when they are performing their appropriate role, that is, looking at the people who have fundamental regulatory and investigative responsibilities, they are indeed filling what was a dire gap in the way the law was being enforced, and if in various cases the Inspectors General simply become that which they ought to be looking after, that oversight function will be lost. You could change it, but we suggest that you do it only with the greatest of care.

Turning to the way that we are acting in the real world, I note, for example, that with the cooperation of the Inspector General of the Department of Defense we have in the most novel fashion successfully for the very first time attacked overseas bid rigging in military contracts, we are actively engaged in suits involving allegations of falsified testing results and other forms of defense fraud, and in these cases we are working hand in hand with the Inspector General without any indication of deflection on the Inspector General's part.

With the critical assistance of the Inspector General of the Department of Health and Human Services, the Civil Division has made a very good start in cases designed to vindicate the Congressionally mandated policy that Medicare must be a secondary payer when other forms of health insurance are available. These cases could save the public treasury many millions, indeed, hundreds of millions of dollars, and the working relationship with the IG, Mr. Kusserow by his own account, and mine, is highly professional and effective. I note that in particular because that is a classic case of where the Government isn't getting money on the pay-in side. Mr. Kusserow was one of the Inspectors General who at least asked me about that form of case. My response is I only wish that he had more resources to devote to those investigations. It hardly seems a matter of whether it is a direct payment out by the Government or the failure of payment in. In either regard, this has direct impact upon appropriated funds. It is clearly within the jurisdiction of the Inspector General. Mr. Kusserow has no problem with that. I have no problem with that. To the extent that the Inspector General of the Department of the Interior here has announced an area of concern that I haven't heard about before that seems similar to that, it would seem to me it is controlled by the same situation.

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[1] See p. 116 for Mr. Gerson's prepared statement.

As far as those cases go, to the extent that Mr. Kusserow and I have any problem, it is the same one. We wish there were more resources that could produce more cases, because both he and I think there are more cases to produce, but there isn't any problem with his jurisdiction.

Let me stay on the subject of the Department of Health and Human Services and its IG for a few moments, for the reasons that that particular IG is among the most active and most competent in the whole Government, and his testimony and criticisms are, at least on the surface as I have read them last night, are the most compelling that you have received. The problem that led to whatever difficulties we had had with that Inspector General—and I believe these are largely abated—originated less with his entering any specific case than it did with the matter that the Secretary of the Department had delegated to him essentially all of the investigative responsibility of an Executive Branch agency.

Mr. Barr talked about the role of the FDA, and that delegation, as far as I could see it, was the heart of the matter or the only matter in dispute. But even looking at that in its worst light, we were talking about an area which by Mr. Kusserow's reckoning amounted to between 6 and 7 percent of the cases with which he deals, and by my count only about 3 percent of the convictions that resulted from these cases. And as to the residuum of cases that was left over after the investigative delegation was withdrawn, we got in a number of them a substantial portion of which should never have come to us in the first place because they were clearly within the Inspector General's jurisdiction. They involved allegations of direct misconduct by agency officials, some of those were generic drug cases, and he belongs in those cases.

To the extent that Mr. Kusserow's remarks might be interpreted as saying that the generic drug investigations were shut down, it was only for the briefest of periods and then only because of some doubt. We believe that that jurisdictional doubt has been allayed. Indeed, during the last 3 days I myself am aware that one of his investigators has been resident in my Office of Consumer Affairs working on these very cases. They are proceeding quite well. They are, as I see it, well within the jurisdictional metes and bounds of that Inspector General, and I think we are doing, together, a very good job in prosecuting those cases, most of which are being prosecuted by the U.S. Attorney in Baltimore and the hides are going on the wall. We are getting those convictions and I expect that is going to continue.

In fact, I think the most difficult issue that we are going to face in those cases is less obtaining convictions than it is keeping that component of the industry where there are honest people viable, because they do offer a good cost containment device. But as far as the corrupt aspects of that industry, we are going to bring it to the ground. Mr. Kusserow is highly dedicated to doing that, and I and my people are no less dedicated to doing it, and it is clearly within his jurisdiction.

The Department of Defense related fraud, another area that we hear the most about, as we toted up the numbers between April 1 and September 30, 1989, the Office of the Inspector General of the Department of Defense conducted 4,811 investigations. By my analysis not a single one of them is adversely affected by Mr. Barr's opinion, or the opinion of the Office of Legal Counsel that preceded Mr. Barr and his clarifications of that.

You, Senator Glenn, and others on this Committee have asked for assurance that fully appropriate attention will be given to subsequent investigations. Mr. Barr and I assure you that we are committed to investigating criminal conduct and our activities will integrally involve the Inspectors General. If a particular agency with responsibility over an investigation needs assistance from its Inspector General and the Inspector General's authority would not encompass the assistance needed, we are aware of mechanisms, some of which Mr. Barr discussed, that could be utilized to deploy those people.

I think the fundamental question, of course, is the one that Senator Roth raised, which is one of resources. And if there is an agency that has investigative responsibility and they are not fulfilling it, the people running that agency perhaps ought to be replaced, or if they are working hard and can't get the job done because they have inadequate resources, they ought to get those resources on the main sequence. They ought not to get them as a result of the elimination of an important oversight function. I think we all agree about that. We all want those investigations to proceed.

In terms of another question that you raised, I guess you just asked Mr. Barr, and it also was raised in the materials that I got, was what are we going to do about allegations of personal liability on the part of Inspectors General and their staff if improper actions were taken. These are so-called Bivens cases alleging constitutional torts and it is my folks who are charged with the defense of those cases and with making at least the initial calls on whether or not to engage in their representation.

I guess there are three things to say about it. The first is nothing that we have done is going to change. The second is nothing that we could do, or nothing that relates to Mr. Barr's opinion would have much effect anyway, because the issue of these often vexatious tort claims is something that we face every day. No matter where the line is drawn we are going to face these things, but I would have to say, as we have looked at the cases, even if the Inspector General is acting outside of his jurisdiction under the Office of Legal Counsel memo, I would be hard pressed to think of any case where a person adversely affected, that is, somebody who was the subject of one those investigations, would have any constitutional claim to complain about the activity of the Inspector General.

That is not the problem here. We don't think any investigation or conviction is going to be imperiled, whether or not we are right, or any given Inspector General is right, or you are right, or Jack Anderson is right about what the jurisdiction ought to be. The question, as we said, is the interpretation of the statute and what the Congress intended by it. Whatever the Congress intended by it, it didn't create any constitutional right that any citizen has that he didn't have irrespective of this determination. So that I don't think any of these cases is going to be in trouble, and I don't think any of the Inspectors General or their staffs are in any trouble that wouldn't have been in otherwise, the same one that I am in when I get up every day and go to work, and we are not going to change the avidity with which we represent Inspectors General or anybody else who are charged in these torts suits. We wish there were less of them.

Chairman GLENN. If there is a tort suit filed, will it make any difference on whether or not you pick up the defense of that person? Will it be based on whether that particular investigation was previously authorized by Justice or not?

Mr. GERSON. It won't matter. The answer is yes to the first part, no to the second part. It won't make any difference. It doesn't have anything to do with prior authorization, because the issue in those cases is whether there was any constitutional tort that was being committed, and as I say, I don't see that any right has been created that would be violated. I think that any suit that was based upon that kind of theory, in my view, would be inherently meretricious. I can't gainsay that some adventurous lawyer wouldn't try to phrase a case like that, but I don't think it would have any merit at all.

Chairman GLENN. Well, the IGs feel it has been put into some doubt, and that is the reason I pursue it a little bit. Your testimony reflects you "see no useful reason to highlight the specific arguments that might be raised to attack the validity of a prosecution."

In light of the fact the Justice Department chose to make this issue a problem for the IGs, I think it is a very important question——

Mr. GERSON. Well, I think I have just answered it.

Chairman GLENN [continuing]. One which you have given Congress no choice but to address.

Is it your position that the U.S. Attorneys will be instructed not to prosecute a case based on an unauthorized IG investigation?

Mr. GERSON. Well, I haven't stated any such opinion and I don't think it is within my jurisdiction ever to say that. Mr. Barr may be called upon to decide about the validity of a given investigation or whether or not we are going to prosecute, and we don't generally reveal our reasons for prosecuting or not prosecuting anyway. What I can within my competency answer is whether I am going to defend any Inspector General or Inspector General staff member who is charged in a tort action as a result of one these cases whether or not we prosecute, and the answer to that is yes, assuming all the other criteria for the defense of one of those cases is met, that the individual was acting within the scope—even an erroneous view of it, that doesn't matter——

Chairman GLENN. Well, have you clarified this to any extent with the IGs, because they are laboring under an apprehension here that I believe is was well-justified.

Mr. GERSON. Well, I can't do that in a general sense, other than I think I have done it now. No IG has asked me. There was some conversation between Mr. Kusserow and a member of the Justice Department over this question. I was dissatisfied with the clarity of the discussion on both sides. If I have clarified it now I have accomplished at least something here. I don't know what else to say about it.

I know of no case that anybody can cite where I have refused, where I have made a non-scope determination, recommended to the Attorney General on this basis. I don't anticipate any. As far as specific questions about specific cases, there are not any. I don't know what else I can tell you.

Chairman GLENN. All right. Go ahead.

Mr. GERSON. Well, I think I have presented what I believe is our objective view of the way that this issue is working itself out. I don't think there is much of a problem, if any. I don't think we are losing cases any place, at least I don't see any. We have had to scramble a little bit to find the right kind of investigative personnel where we need them, but I think that is a problem no matter who has jurisdiction. There is a lot more to do than we have people to do it, and I think we all concede that, and I see a lot of that at the root of your statement which I read this morning, and many of the comments that I have heard today.

The value judgments that we are going to make, we haven't heard anything related to the Constitution raised here today, we are talking about some practical judgments. The value judgment you are going to make in recommending legislation is whether or not you can consider the kinds of broadening that you are talking about while maintaining the essential Inspector General function that we all desire, one of oversight. That, as I see it, is the issue. I would ask that my formal statement be made part of the record.

Thank you.

Chairman GLENN. It will be included as part of the record.

We have had testimony today from the IGs that with the exception of one item that came up within the State Department back in 1984 I believe. There was no complaint that IGs were exceeding their investigative authority.

Thirteen years later, why is this the time that we make this challenge? Either one of you.

Mr. BARR. Senator, I think the fact that there was no complaint should tell you something, which is that this is not a question of Department of Justice off on a toot going after the IGs. We have no axe to grind here. The issue was presented for the first time to the Department of Justice in the context that I described.

Chairman GLENN. Well, can you state unequivocally that the creation of the Department of Justice IG in 1988, which the Department of Justice opposed bitterly, was not a factor in the decision to issue the OLC opinion, which in effect weakened the IGs?

Mr. BARR. Well, I wasn't in the Department of Justice when the opinion was issued, so I would like to answer it that way. I have looked at the correspondence, I have looked at the papers back and forth between Doug Kmiec and the people in Labor who were presenting this to him. OLC was not interested in addressing this issue in the way it was presented and tried to avoid addressing the issue and said, come to us when you have a specific, concrete fight, we don't like addressing these general issues. And so it didn't look to me as if OLC was going off trying to draw a line in the sand, as has been described. And it was not meant—and I think people should go and read the opinion. It is not an attack on the IGs. There is nothing in there suggesting that there is a problem with IGs being rogue elephants or anything like that. We are not saying that there is a big problem out there. A specific dispute was presented and an opinion was written, and from what I can tell, there are not that many issues out there.

Chairman GLENN. Well, is the Department of Justice in favor of the IG system that we have set up, or do you oppose it?

Mr. BARR. As far as I am aware, we support the IG system.

Chairman GLENN. Well, you opposed bitterly putting it into the Department of Justice. We went through quite a wrangle on that, and we made some special arrangements because of the special nature of the Department of Justice. It wasn't that we were ramming something down their throats, we wanted to be very cooperative.

Mr. BARR. Well, I think that any suggestion that the Office of Legal Counsel was doing this in a vindictive way because of the creation of the IG in Justice is way off the mark. I understand that part of your request was for the Department to describe our experience with the Inspector General, and I understand that a letter is being prepared reviewing that. But from what I can ascertain of the record, and I can tell you in my own conduct over the past year when these issues have been presented to me, I am interested in applying the law as written by Congress as best I can construe the intent of Congress. I'm not interested in——

Chairman GLENN. Well, the reason I question the support for the IG community is the Department of Justice was put under the IG Act itself in October of 1988. In April 1989 the office began to function. It took the Administration until January 29, 1990, to nominate an IG.

Why such an extensive delay if you are all behind the IG program?

Mr. BARR. Well, I can't answer that, I wasn't involved in selecting the IG.

Mr. GERSON. Nor was I. Indeed, I don't know exactly what to say about.

Chairman GLENN. Well, I know that making those nominations is a little above your pay grade, I agree with you on that. But it is a thing where we look at the implementation of the IG Act as it is applying to DOJ and we see a lot of foot dragging, we think, from our vantage point here.

Mr. BARR. Can I say, Mr. Chairman, that the position has been well handled by the acting IG, Tony Moscato, a career Department of Justice lawyer who I think would tell you he has received complete support from Attorney General Thornburgh and this Department.

Chairman GLENN. I guess what my bottom line is, I don't question that the Department of Justice is just as dedicated to right and justice and wanting to root out fat, fraud, waste and abuse as everybody else is. You are the leaders in that field, and I would think you would welcome the help of the IGs. You have already prosecuted 5,600 cases. This has been a successful program for 13 years, and nobody has raised any questions about it.

And why not welcome this help? We are all trying to head in the same direction on this, and yet we seem to be into a turf fight, and my ego is involved, and your ego is involved, and somebody else's ego is involved. And so what happens, we are about to kill something that has worked very, very well over the last 13 years I think.

It has fit in this area where there are not great big monstrous FBI investigations of some kind. All the areas that have been mentioned here by the IGs this morning, they are going to fall in the crack without this. And instead of welcoming this we seem to be fighting it. I don't understand why.

We talked to Mr. Darman. Yes, he is going to get on this. Mr. Hodsoll says yes, we have had meetings. DOJ apparently digs in their heels. Then somebody else digs in their heels and we get nothing done. It is all a turf fight and an inside-the-beltway type scrap here and what is going to happen, we are going to wind up weakening the IGs' authority to do things and to root out all these things that I think you are all working together on, or should be.

Mr. GERSON. We think so too.

Chairman GLENN. Well then why weaken their authority?

Mr. GERSON. I don't think it is a turf fight.

Chairman GLENN. Well, why weaken their authority?

Mr. GERSON. Well, we are not talking about weakening their authority.

Chairman GLENN. It has already been done.

Mr. GERSON. Well, let me suggest something, that to the extent it is done it shouldn't have been done. It certainly wasn't mandated by the OLC opinion. The OLC opinion, as I read it—and, of course, I read it coming into the Justice Department long after it was published—responded to a question of what the Inspector General authorities were.

Now, there is a legal question there and it is reflective of a philosophy that the primary purpose of the Inspector General is one of oversight, it is to serve as a watch dog.

Chairman GLENN. Well, why has there been such a hesitancy to get together and talk these things out so we can all decide where we are going from here? We depended on the Administration to do that and we have gotten nothing, zip so far.

Mr. GERSON. From the standpoint of the Civil Division there has been no hesitancy to do anything. Where we have had even the specter of a problem being raised I myself sat down with the Inspectors General and we are moving the cases, and I think the results show that.

Chairman GLENN. Well, will you sit down once again with whoever from Justice, sit down with Mr. Funk representing the IG community, or whoever is going to represent it now, and Mr. Darman and his people from OMB or whoever, and try and work this out?

I don't particularly want to go the legislative route. We have legislation here to propose, and once again that will be taken as ramming something down your throat that you don't want and there will be even more foot dragging, and I don't want to go ahead that way, I truly don't. Isn't there a chance that you can still get this thing worked out to where it smooths it out for everybody and leaves the IGs doing the good job they have done all these years?

Mr. BARR. I think so Senator, and that is what I have been trying to do. Let me just say that no one here is talking about weakening or bringing down the Inspector General system. I believe that they have extremely broad investigative authority within the framework of the statute. The issue is whether or not they can also carry out regulatory investigations when those are properly the functions that are assigned to other components within the Department.

But as I have said, I would like to sit down, would welcome the opportunity to sit down, and have asked since September for IGs to present concrete examples of where they feel they have been blocked off. Now, the three that have been presented to me so far, I have ruled or issued the advice that they are not blocked off, that they are well within their authority, and that the examples that were being thrown up were——

Chairman GLENN. Well, you say they could continue with regulatory investigations. Define "regulatory investigations."

Mr. BARR. Well, I think where there is a statute that authorizes an agency to impose rules of conduct on regulated parties outside the agency, and then empowers the agency to conduct enforcement activity to ensure that there is compliance by the private citizens, and that that this is part, as the legislative history says, of the integral function of the agency's program, that is what we mean by a regulatory investigation. So an OSHA investigation, a Fair Labor Standards Act investigation, specifically referred to in the legislative history.

Chairman GLENN. You wouldn't get in the way of the IGs doing that kind of investigating——

Mr. BARR. Oh no, that is what we are saying they cannot do.

Chairman GLENN [continuing]. Even though it involves third parties outside, no Federal money, no Federal dollars or employees involved?

Mr. BARR. No. That is what we are saying they cannot do.

Chairman GLENN. They cannot do?

Mr. BARR. They cannot do those.

Chairman GLENN. Why?

Mr. BARR. Because that is the job of the Department of Labor's Assistant Secretary for Occupational Safety and Health. That is the integral part of the program they are supposed to be overseeing. The House report specifically cites—one of the thing that made this opinion somewhat easy, I think, for my predecessor was the House report specifically says look, we are talking about oversight investigations, that is what the IG should be doing. They should not, for example, be carrying out investigations under the Fair Labor Standards Act. That is an integral part of the program of the Department of Labor. They should be overseeing that.

Chairman GLENN. But where there may be malfeasance of some kind in administering those programs, the IG couldn't get into it if it involves an outside third party?

Mr. BARR. No, where there is malfeasance within the Department——

Chairman GLENN. It may be from with inside, but they couldn't go outside and——

Mr. BARR. No, in fact, I told—let's take the FDA case. In the FDA situation there had been three convictions—I believe three convictions—at the time there had been three convictions of FDA employees, and what we said was that we thought the IG had authority to conduct those generic drug investigations initially against third parties because there was a sufficient basis to believe that there was collusion and that part of the problem here was malfeasance within FDA. And Sherman Funk raised the example of the visa counterfeiting rings, and I told Sherman, and I will say it here today, if there is a basis for believing—if he has some basis for an investigation because he believes that a ring in Beirut or wherever is linked to misconduct within the Department, he can conduct that investigation, including targeting the people on the outside because there is a basis for his jurisdiction.

Mr. GERSON. I would go further and say he also could be wrong and still be allowed to go forward, because the issue is whether as a matter of logic your experience tells you, or besides a specific allegation, that the fraud would only work with the complicity of somebody inside, we certainly countenance the Inspector General going forward first to see whether his preconception based upon experience or a specific allegation is true, and if it is, to continue on.

Chairman GLENN. Can you point to any cases investigated by an IG prior to your OLC opinion in 1989 where an IG exceeded his authority and undertook responsibilities that were not his?

Mr. BARR. No.

Chairman GLENN. Mr. Gerson, can you?

Mr. GERSON. I don't think so. I mean, there is some dispute over a body of FDA cases that has come to us, and my own reaction to that has been at this point I am less concerned about engaging in a debate with the Inspector General than I am in making sure that we don't lose any cases. So that we sent some back which clearly involve corruption. We have sent some others to the FDA with our oversight to make sure they are going to do their job, and we have offered the backup of the FBI. I don't want to engage in that kind of microscopic analysis to see who is right or wrong and risk losing a case. So my only hesitancy is about that. I wanted to make sure that every case had a home where some good was going to be done on it, but I concur with Mr. Barr's remark.

Chairman **Glenn**. In almost 13 years of operation there has never been a time that you know of where the IGs exceeded their authority, and yet you feel you need to limit what they are doing?

Mr. **Gerson**. But that is the point of all this. If you place this in its historical perspective, you see why everything you say is correct and there is no problem. There was no problem to begin with, because we think there was a generally acceptable and uniform understanding of what it is that the Congress did, hence there wasn't anything to oppose. As far as the way this is working in practice, there still wasn't anything to oppose or to describe any concern about until we were asked a specific question. That was answered.

Now, that raised a whole bunch of straw men, not of the Justice Department's creation, of others. If we have done some good as far as wiping away those straw men, then this exercise and others like it are proving of some merit and we can go forward without any legislation. But I think that that is a fair analysis of what has happened.

Chairman **Glenn**. Mr. Barr, you made a point a while ago that I wanted to respond to. You stated that the legislative history compels the conclusion that IGs do not have authority to conduct investigations that are, "an integral part," of the agency's programs. For support you cite the House Government Operations Committee report which states that the IGs would not have the responsibility for such investigations—responsibility for such investigations.

Now, there is a big distinction between authority to act and having the responsibility to act. Don't you see that big difference?

Mr. **Barr**. Well, I don't think there is a big difference in this context. I think that when the legislative history talked about responsibility there they were talking about authority. The statute itself also uses the word "responsibility and duty" when it assigns authorities to the IG. But that is not the only legislative history.

Chairman **Glenn**. The IGs were to have the authority to get into areas as they see things that need to be looked into.

Mr. **Barr**. Excuse me?

Chairman **Glenn**. The IGs were supposed to have the authority to look into areas that they think need to be looked into, but the ability to run the program was not theirs. That is what we talked about a little while ago here. That was never intended.

Mr. **Barr**. Well Senator, looking into things is frequently part of the program. Now again, using the examples we dealt with in the March opinion, if the Assistant Secretary for OSHA, part of his job is to go out and inspect plants and to do the paperwork and make sure that plants are conforming to the standards that are required. Now, that is his job, that is a statutory, regulatory program and the power of the Government over that factory owner is by virtue of that statute, that regulatory statute.

Now, what the IG's role is—and I agree with Senator Roth, at least that is our understanding of what the intent of Congress was—the IG's role there is not to look into things that need looking into. If he decides, "Well, I don't like the way that assistant secretary is carrying out his program, he is not bringing enough criminal charges, he is treating too many things as civil violations, I think there is an imbalance there so I am going to go out and investigate factory X."

Now, what am I investigating factory X for? We are saying if the IG says, I am going out to investigate factory X to see if they are complying with OSHA, that is not what he is authorized to do. His job is to look over the shoulder of the assistant secretary who is enforcing that statute and if he doesn't like the way he is doing it, to call that to people's attention.

Now, I do want to get back to one thing, and that is there is some latitude to go out and investigate private regulated parties. Let's take this example again. In assessing the efficacy of the OSHA program, for example, I think the Inspector General has to have latitude to go out and look at some of the regulated parties and to determine whether or not OSHA is doing a good job in enforcing compliance, sort of a spot check kind of thing. But they don't have a roving commission to go out and investigate factories for the purpose of enforcing OSHA. That is someone else's job.

Chairman GLENN. Let me give you an opinion of one of your former assistant attorney generals at the Justice Department. In 1987, former Assistant Attorney General Markman provided testimony before this Committee that showed an understanding of the IG's "authority to make whatever investigations he or she might deem appropriate."

And he stated that the Attorney General would be without authority to halt or redirect those investigations. During negotiations over the 1988 IG law, we provided for the Attorney General to specifically halt certain investigations of the Justice IG if he provided notice to Congress. No problem. That was special just for the Department of Justice. We did not change the basic authority of the IG to investigate in the first place.

This would appear to be a real change of position for the Department. How do you explain the Department's change of position?

Mr. BARR. Well, I can't say what Steve Markman meant, but I don't read it necessarily as a change of position. I went back and looked at the Attorney General's letter to you of September 13, 1988, and my understanding of the thrust of the concerns of the Department were precisely interference in pursuing mismanagement, malfeasance, fraud, waste and abuse within the Department, and I don't read Steve Markman's comments as suggesting that the Department of Justice in 1988 construed the Inspectors General Act as giving Inspector Generals plenary investigative authority over the jurisdiction of the Department of Justice. I don't think that was ever in people's minds, but I really cannot put myself in Steve Markman's head.

Chairman GLENN. The legislative history of the IG Act shows that unlike the House bill the Senate version included a broad definition of "investigation," which authorized the IGs to investigate, "misconduct, malfeasance, non-feasance, fraud or criminal activity on the part of any employee, person or firm directly or indirectly connected," with the agency.

However, even this definition was rejected by the key House and Senate members as being unnecessary, and Senator Eagleton explained its deletion from the final bill saying, "Investigation is a term with a generally well understood meaning."

It appears that 12 years later Justice has overturned that policy without demonstrating there was a pressing public policy reason to do so. Is that what Justice intended?

Mr. **Barr**. Well, what the Justice Department did was do its job, which is to provide legal advice to people who ask for it. Now, in our view there is a clear distinction in the statute between two different types of investigations, and that is investigations that are within the jurisdiction of IG, which are oversight investigations, and then those investigations which are part of the regulatory program itself against regulated parties and are an integral part of the program that the IG should be overseeing, not conducting.

Chairman **Glenn**. Mr. Gerson, let me ask you, I think the IGs would like a very direct answer on this.

Is your testimony today that in every instance in the future where individual IG agents will face legal challenges to their authority to investigate, the Justice Department will defend those agents in court and not require them to hire personal lawyers?

Mr. **Gerson**. Well, I can't answer that question "yes" or "no" but what I can say is that no determination as to not representing somebody will depend upon whether the IG——

Chairman **Glenn**. Well, let me say, unless there was criminal activity on their individual part for some reason or other. Outside of that——

Mr. **Gerson**. Well, that is not the standard for representation. That it is the difficulty. What I can guarantee you is that this jurisdictional question will have nothing to do with any decision made to represent somebody in such a case. In other words, I can't foresee not representing an Inspector General who was performing the job of an Inspector General, irrespective of what the appropriate jurisdiction is. If somebody under the guise of being an Inspector General went into an agency other than the one for which that Inspector General had authority—just to pull a very far fetched example of misconduct that would probably be criminal as well, then you would have an activity that was not within the scope of that person's duty. But that scope doesn't depend upon a correct jurisdictional determination, as I said earlier, and we will not disqualify from representation by the Government anyone on that basis. I think I have said that as clearly as it can be said.

Chairman **Glenn**. Okay. And that would apply whether or not they had applied to you for prior permission to investigate a certain area?

Mr. **Gerson**. That is right. I said that, and I don't expect that it would be appropriate or useful to have such case-by-case applications in any event, especially in view of both my testimony and Mr. Barr's that we foresee a rather broad jurisdictional permit for the Inspectors General. The area that Mr. Barr just talked about is a relatively limited area, and even when you touch upon the issue of regulation it still admits, as Mr. Barr himself has said, of Inspector General jurisdiction to look into mismanagement, misconduct, improper activity by the people who are conducting those regulatory programs that the Inspector General otherwise doesn't have jurisdiction to look into it.

Chairman GLENN. Senator Levin was unable to be here this morning because of other responsibilities. He has asked that I ask these two questions on his behalf, and I will. I am glad to do so.

The Program Fraud Civil Remedies Act authorizes the IG to conduct investigations against fraud. You have said any noncompliance with a regulatory program can be called fraud against the program. Doesn't that mean under the Program Fraud Civil Remedies Act the IG is authorized to investigate noncompliance with a regulatory program?

Mr. GERSON. I don't think so, and I think Mr. Barr's earlier testimony hit exactly that point. I think in a large number of these cases, as both he and I have testified, you are talking about just the kinds of things that come within the civil program remedies that you are talking about and that the IG has jurisdiction. Mr. Barr also I think accurately described the particular areas where the IG doesn't have jurisdiction.

Chairman GLENN. A follow-up on that. During that investigation, if the IG turns up evidence of criminal conduct, can he refer the criminal allegations to the Attorney General?

Mr. BARR. Of course.

Mr. GERSON. Of course.

Mr. BARR. That is what he is supposed to do.

Mr. GERSON. I'm not sure if something is being missed in the translation of that question, but that is exactly what the Inspector General is supposed to do.

Mr. BARR. Let me just say on the question of the Program Fraud Civil Remedies Act, we have never been asked to address that. That was not part of the March opinion. That is a self-contained, freestanding statute that confers additional investigative authority on Inspectors General.

What I was saying was that the Sections 4 and 6 which were addressed in the March opinion, we were discussing in that opinion the scope of that authority, and incantation of the words "fraud against program" as being sort of a key by which you can walk through that door or brush aside any inherent restrictions in Section 4 and 6 I don't buy off on.

Chairman GLENN. Mr. Gerson, exactly what assurances have been given and by whom to make you comfortable that the FBI will handle significant criminal investigations for which no other resource is available? For instance, what is significant? Who decides significant? Who is going to pick up the insignificant cases?

Mr. GERSON. Well, that is a more difficult question than the first part.

Chairman GLENN. Well all right, let's break it down then. Are you comfortable the FBI will handle significant criminal investigations for which no other resource is available?

Mr. GERSON. Well, I made the representations that I made consistent with what my criminal jurisdictions is and, of course, I am the head of the Civil Division, but I have criminal jurisdiction over matters under the food and drug laws. So what I had to say on that subject was with respect to that, and I said it, so that is where that authority came from. But I also said it with the permission and knowledge of my boss, the Attorney General.

I am not aware of other specific references in that regard, though their existence doesn't surprise me. I just won't attribute the source.

Chairman GLENN. Who defines significance so we will know whether the IG or FBI is supposed to be doing something?

Mr. GERSON. Well, there are some cases which both the Inspectors General, the United States Attorneys, and I and the Attorney General believe are insignificant, because each of us turns down cases in these cares we are talking about because they are isolated incidents, de minimis in value, there isn't anything than an allegation to support them, so we all turn them down, and we do know those when we see them. But those are matters of prosecutorial discretion that all of us have and that is what we are talking about.

A significant case then in my view is one that has evidence to support it and there are misdemeanors, for example, prosecuted by United States Attorneys all over the country, so the distinction can't be between a felony and a misdemeanor. The distinction has to relate to the gravity of the offense, the amount of evidence available to support it, and the available resources to go after it.

Mr. BARR. Mr. Chairman, you before asked whether or not there was any willingness to continue discussions with the Inspectors General, and I would welcome that opportunity. I think I had some initial discussions, as I said, with Sherman Fund and I felt we made some progress in narrowing and defining the areas of potential disputes. There was a time then where the Inspectors General were not sure they wanted to be talking to OLC, and now I understand that there might be willingness to talk to OLC about it. And some of the examples they gave this morning are things that we would like to talk to them about. I think some of them will not pose a problem. My tentative view is that it would not pose a problem.

But at least I would like to pursue with the Inspectors General the three issues that I raised at the beginning. I would like to look at where are these frauds in the program that do not implicate regulatory programs, and second, what are ways of preserving the distinction and the line of authority that I think is important as a policy matter, but eliminating consequences for crossing that line in terms of protecting the Inspectors General from personal liability and making sure that cases or convictions aren't thrown out, and thirdly, ways of adjusting resources. For example, there are cases where we would like—the U.S. Attorneys would welcome greater participation by the IGs in investigating cases because of learning curve, because of special expertise, because of high quality of Inspector General investigators, and we would like some flexibility in being able to use them without some of the financial difficulties that entails.

Chairman GLENN. As I said earlier, we are all trying to head in the same direction on this and trying to get at the same difficulties in Government and restore some confidence to Government, and I hope even at this point you can do exactly what you just indicated, get together with the IG Community, OMB, whoever else was involved in those original discussions. We were assured last fall that these were going on and the likelihood was it was all going to be worked out, there would be an agreement and that would be that.

Nothing has happened. That is the reason for this hearing this morning, as to point out that this cloud that the IGs see over their operations is still there.

And I think it is in the interest of everybody to get this done, and whether we put in a bill or not and try and bring it through to hearings, additional hearings and/or markup and so on, still remains to be seen. We could put that in and may do that, I don't know. But I would hope that you could get together and work this thing out so we don't need legislation. It has become a very bad situation, so I hope you can do that.

Thank you all very much. You may get some additional questions from other members of the Committee that were unable to be here this morning. We hope you would respond to those and we appreciate you being here. Thank you much.

The hearing will stand in recess.

[Whereupon, at 12:20 p.m., the hearing was adjourned subject to the call of the Chair.]

APPENDIX

STATEMENT OF

RICHARD P. KUSSEROW
INSPECTOR GENERAL
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. Chairman and members of the Committee, I appreciate the opportunity to appear before you today as your Committee considers an issue of critical importance to the entire community of Inspectors General (IGs); the effect on OIG operations of the March 9, 1989 opinion of the Office of Legal Counsel ("OLC opinion") entitled, "Authority of the Inspector General to Conduct Regulatory Investigations."

Brief Overview of the OLC Opinion

The OLC opinion arose in response to a dispute at the Department of Labor (DOL) over the scope of the OIG's inherent authority to conduct investigations pursuant to regulatory statutes administered by the DOL. The OLC opinion concluded that the Inspector General Act of 1978 did not confer on the IG authority to conduct such "regulatory investigations" (defined by DOJ as investigations that have as their objective regulatory compliance by private parties), because Congress intended that the OIG's jurisdiction extend only to investigation of waste and fraud by employees, contractors, grantees and other recipients of Federal funds. The OLC opinion further stated that the IGs have only an oversight role with respect to regulatory investigations -- that is, the OIG may investigate the Department's performance of a regulatory investigation, but may not conduct the investigation itself.

General Effect of the OLC Opinion

We understand and accept that the Office of Legal Counsel issued an opinion which they believe is compelled by their reading of the IG Act of 1978 and its legislative history. However, it must be understood that introducing these jurisdictional stipulations after OIGs have been operating for as many as 14 years has caused considerable disruption in agency operations.

As a general matter, we know of no IG who heretofore understood his or her investigative jurisdiction to be restricted to fraud by recipients of Federal dollars. On the contrary, both IGs and agency officials believed that IGs were charged with responsibility to preserve the integrity of their agencies' operations by investigating fraud directed against those agencies, regardless of the identity of the perpetrator of the fraud. Over time, agencies have come to rely on the OIG as a valuable resource for referral of fraud against all programs, including fraud by private parties against regulatory programs. Clearly, the OLC opinion will disrupt these arrangements in several significant ways.

First, IGs have been compelled to withdraw from ongoing fraud investigations that do not involve agency employees or recipients of Federal dollars. These cases have been discontinued without regard to their status or merit. In some cases, prosecutors have been left, on the eve of indictment and prosecution, without knowledgeable agents to complete the investigation. At best, there has been significant delay in ongoing cases.

Prospectively, the exclusion of the IGs from certain classes of fraud investigations leaves many regulatory programs ill-equipped to handle new allegations of potential violations. For example, the Food and Drug Administration (FDA), had previously chosen not to hire their own criminal investigators, preferring to rely on investigators of the Federal Bureau of Investigation (FBI) or, since 1977, OIG to assist them when necessary. With the OIG no longer available, the FDA and other regulatory programs must find alternate arrangements for handling such allegations.

The FDA has responded by initiating action to hire its own criminal investigators to perform those fraud investigations that had previously been conducted by the OIG. This regulatory agency, and other agencies that follow suit, will incur considerable expense in hiring and training investigators, simply to duplicate a function that is available from the OIG. Moreover, the result will be to once again establish a host of "in-house" criminal investigative units in each large Department or agency. This fragmentation of investigative resources is precisely one of the problems that the IG Act was passed to remedy, through consolidating investigative functions under a single, independent official.

The FBI cannot reasonably be expected to assume sole responsibility for all cases throughout government that have been called into question by the OLC opinion. Already, the FBI relies heavily on the various IGs to assist them in cases involving fraud against the government. In testimony before the House Committee on Government Operations in 1988, the Associate Director of the FBI stated that 90 percent of the FBI's investigations in the area of governmental fraud involved joint efforts between the FBI and one or more Inspector General. The FBI may no longer enlist the assistance of the IGs in those cases that do not fall within the parameters of the OLC opinion, thereby further taxing an already overburdened law enforcement community.

The limitation placed on OIG jurisdiction has already been raised by a number of private parties doing business with the Department of Health and Human Services (HHS), in an effort to avoid liability under a variety of HHS program statutes. For example:

-- Medicare Secondary Payor (MSP) provisions: Under Medicare, a private insurer must pay as primary payor on behalf of employed "working aged" individuals who are also eligible for Medicare. It has come to the attention of HHS that many private insurance companies are avoiding their financial responsibility under MSP, at an estimated cost to the government of possibly billions of dollars. Working with the DOJ and the Health Care Financing Administration, the OIG has conducted both audits and investigations of private insurance companies to ensure compliance with the MSP provisions. In one such audit, OIG subpoenaed relevant records from Travelers Insurance. Travelers responded that the OIG subpoenas were unenforceable under the OLC opinion because the private insurance company received no Federal dollars, and was therefore outside the scope of the OIG's jurisdiction. The OIG was required to seek an opinion from OLC as to our authority to participate in these investigations. The OLC responded that OIG investigation was proper, since it was part of an "oversight investigation of an assistance program," "related to the oversight of the administration of the Medicare program." After litigation, the subpoenas were enforced.

-- The OIG conducted an investigation of an anesthesiology group practice for submitting false claims to Medicare, and sought to impose civil monetary penalties (CMP) and assessments under section 1128A of the Social Security Act. In response, the group asserted that the OIG had no authority to conduct such CMP cases, because the Secretary's delegation of CMP investigative authority to the OIG was impermissible under the OLC opinion. The Administrative Law Judge upheld sanctions against the anesthesiology group without directly discussing the OLC issue. The matter is currently on appeal to the Department's Appeals Board.

-- In an investigation related to the submission of false statements in connection with a Medicare investigation, the defendant initially argued that the OIG was precluded from conducting the investigation by the OLC opinion since the case involved neither Federal money nor employees. The Department of Justice was not persuaded by this argument, and proceeded with an indictment of the Defendant. The case is awaiting trial.

The IGs and the Department of Justice, can anticipate having to continue to address these and other attempts by defendants in Federal actions to "hide behind" the OLC opinion.

We perceive no benefit or logic in creating or continuing the separate jurisdictional provision for fraud involving Federal employees or Federal dollars, only. Certainly, fraud schemes directed at securing government licenses, leases, marketing approvals, passports, Social Security numbers, or patents are every bit as damaging to the integrity of agency programs as is fraud by recipients of Federal funds. Whether it is committed by an agency employee, a grantee, a contractor, or a private party doing business with the government, all fraud seriously obstructs an agency's ability to effectively administer its programs.

Thus, the precipitous limitation on OIG authority to investigate fraud by private parties against the government's regulatory programs has and will continue to have a significant detrimental effect on efficient enforcement of Federal law.

Contradictions between OLC Jurisdictional Limitation and Other OIG Authorities

Program Fraud Civil Remedies: Under the OLC opinion, the IGs may not investigate the conduct of private parties outside the government who seek to defraud the agency through the use of false statements or other means which do not involve Federal funds or employees. However, in contrast to the OLC opinion, the IGs have the statutory responsibility to investigate such misconduct under the Program Fraud Civil Remedies Act, 31 U.S.C. §3801 *et seq.*

Enacted in 1986, the Program Fraud Civil Remedies Act established an administrative remedy for false, fictitious or fraudulent claims and statements to all the major agencies of the United States government. To carry out this remedy, the statute prescribes that an "Investigating Official" shall conduct all investigations under the statute. The statute explicitly states that the "Investigating Official" shall be the Inspector General of every agency which has an IG.

The definition of the term "statement" in the statute has been given a broad effect in the standardized regulations which were adopted by the agencies affected by the Program Fraud Civil Remedies Act. The meaning of "statement" includes any representation made regarding anything of value granted by the agency, "including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status or loan guarantee." See, e.g. 45 C.F.R. §79.2.

The Senate Committee on Governmental Affairs was quite deliberate in expanding the reach of investigational authority of the Inspectors General beyond matters involving

Federal funds. In response to arguments by the American Bar Association that false statements unrelated to actual claims should not be included in PFCRA, the Committee responded, "[W]hile the government may not suffer monetary damage, the Committee believes that false statements adversely affect government programs . . ." S.Rep.99-212 (Dec. 10, 1985), 18.

Thus, the IGs are required by statute to investigate false statements by applicants for a wide variety of Federal benefits other than Federal dollars for purposes of the Program Fraud Civil Remedies Act, but are seemingly prohibited by the OLC opinion from conducting such investigations as criminal fraud or false statements cases. The OLC opinion makes no mention of the Program Fraud Civil Remedies Act. Therefore, the IGs are without guidance as to how to reconcile this statute and the OLC opinion.

Whistleblowers:

Under section 7 of the Inspector General Act, an IG may:

> receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

Further, the IG is prohibited from disclosing the identity of the complainant to any person without the consent of the complainant, or a determination that disclosure is unavoidable "during the course of investigation."

Clearly, the allegations that the IG may receive and investigate under this section are not limited to wrongdoing by Federal employees or recipients of Federal funds. It is unclear how the OIGs are to proceed when they receive such complaints. Under the OLC opinion, the IGs may not investigate such matters. However, under section 7, they are not permitted to refer information concerning the complainant to another law enforcement agency for investigation. The IGs are without guidance as to how to reconcile these provisions.

Mr. Chairman, I would like to devote the remainder of my testimony to a more detailed discussion of the adverse impact of the OLC opinion on specific operations of the Department of Health and Human Services; most notably, the programs of the Food and Drug Administration (FDA).

Since our establishment in 1977, the OIG at HHS has conducted investigations of offenses involving programs of the FDA when requested to do so by the FDA (which does not employ in-house criminal investigators) or the DOJ, or when FDA violations were uncovered in ongoing OIG investigations of other programs of the Department. These cases usually involved fraud against HHS; an area that falls squarely within the expertise of an OIG.

In recent years, the number and variety of cases of criminal wrongdoing has increased. One factor in this growth has been new legislation such as the Prescription Drug Marketing Act, that broadened the number of activities subject to criminal sanction under the Food, Drug and Cosmetic Act. Partly in response to such new legislation, in 1987, the General Accounting Office in a study conducted for the House Committee on Energy and Commerce, advocated a more active role for the OIG in FDA criminal investigations, and recommended that the OIG and FDA develop a plan delineating "the types of FDA investigations that will be referred to the Inspector General, [and] when such referrals should be made."

Shortly after issuance of the GAO report, troubling allegations were made indicating corruption and fraud in the FDA generic drug approval process. In June 1988, the OIG was alerted by the Chairman of the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of possible acceptance of payoffs by FDA personnel from generic drug companies. Subsequent OIG investigation also disclosed fraudulent statements in applications for approval to market drugs and fraudulent drug substitution in the course of the approval process.

Given these instances of internal corruption, the attention given FDA enforcement matters by the Congress and GAO, and the need to take immediate action to ensure continued public confidence in FDA, it was deemed advisable for the joint enforcement responsibilities of the FDA and OIG to be reinforced in a written Memorandum of Understanding (MOU). This MOU, which sets forth investigative responsibilities and procedures, was intended to make the most effective use of the strengths of both organizations. The MOU was signed in January 1989.

On March 9 of the same year, the OLC issued its opinion concerning the scope of OIG investigative jurisdiction. Shortly after, the U.S. Attorney's office in Baltimore (which was handling a number of OIG-investigated cases involving corruption in the FDA) was advised by Headquarters DOJ that the OLC opinion would apply to FDA matters so as to restrict OIG involvement in those matters. The U.S. Attorney's office, in turn, contacted HHS.

In order to sustain successful joint efforts of the OIG and FDA, the Commissioner of FDA, the General Counsel and the Inspector General recommended to the Secretary that he formally delegate authority to conduct certain felony criminal investigations under the Food, Drug, and Cosmetic

Act to the OIG. The Secretary did so on July 24, 1989. It must be emphasized that the purpose of the delegation was to preserve ongoing OIG participation in investigations being conducted in accordance with the earlier MOU. The delegation was not intended to grant to OIG any new authority over FDA regulatory, compliance or program matters.

The Department operated under the delegation for approximately 6 months. In late December, the Secretary rescinded the delegation effective January 29, 1990. It is our understanding that this rescission was recommended by the Department of Justice pursuant to the OLC opinion.

The OIG was advised by DOJ that with the rescission of the Secretarial delegation, the OIG had no authority to continue investigations in the FDA area unless the matter involved misconduct by a Departmental employee, or fraud on the part of a recipient of Federal dollars. OIG was cautioned by the DOJ Office of Consumer Litigation (OCL) that continued investigation of other FDA cases put our special agents in jeopardy of personal tort liability under Bivens. We were instructed that all cases and allegations received by OIG involving potential criminal conduct in programs of the FDA should be forwarded to the OCL for review and a determination as to the appropriate disposition of the matter.

In accordance with the above policy, in February 1990, the OIG ceased work on all ongoing investigations relating to FDA and closed those cases. Where cases were being investigated jointly with fellow law enforcement agencies, OIG withdrew and requested that the fellow agency complete the investigation alone. All other case files were forwarded to the DOJ Office of Consumer Litigation. Where cases were logged into the various U.S. Attorney's offices for prosecution, the OIG withdrew, with apologies and explanations. All new allegations and complaints were also immediately forwarded to OCL.

Current Status of FDA Investigations

The withdrawal of OIG from whole classes of investigations has left a significant gap in the Department's enforcement resources. More importantly, these cases have a direct and significant impact on the public health and safety. Fraud in an application to market a drug could cost more than money; it could cost lives. In order to ensure effective, immediate and adequate coverage of FDA investigations, and to secure the time necessary to implement long-range steps to enhance FDA enforcement, it was imperative that the OIG and the FDA again work together.

First, the OIG requested written guidance from DOJ as to the proper scope of OIG participation in FDA matters. That guidance was provided on March 28, 1989, by Memorandum from the Assistant Attorney General, which states:

- the IG may investigate matters involving FDA employees and those acting in collusion with those employees, or recipients of Federal funds from FDA;

- the OIG may not investigate any matter that is solely a violation of the Food, Drug and Cosmetic Act, including fraud and false statements in connection with drug and device approval.

- the OIG may investigate "mixed cases," or those that involve matters both within and outside OIG jurisdiction, only so long as their is a "sufficient nexus" between the violations. Such determinations are apparently made by the Department of Justice. Absent this "nexus," the IG may investigate only those matters within his jurisdiction; other Federal violations must be referred for a second investigation by another office with appropriate jurisdiction.

Pursuant to these guidelines, the OIG is returning to investigation of those limited classes of cases within our jurisdiction. As mentioned above, FDA also plans to hire and train a cadre of criminal investigators to conduct investigations within the FDA.

The Department is considering a legislative proposal that would give the Secretary greater flexibility in the use of FDA and IG criminal investigative resources in designated classes of cases. In the meanwhile, the OIG has been requested to assist the FDA with ongoing cases until such time as FDA has instituted its own staff of criminal investigators. We have asked the Department of Justice whether the Attorney General might authorize OIG involvement (or confer jurisdiction) in these cases for a stipulated period of time. The DOJ response has been discouraging. Instead, the Justice Department indicated that the only way that the OIG might temporarily assist in these cases is by way of details of OIG agents to the FDA.

Understandably, the OIG has been very reluctant to effect such details; believing that they are not consistent with OIG independence as set forth in the IG Act. However, the OLC opinion has placed this office in the untenable position of either turning its back on investigations that potentially affect the public health, or compromising our independence. Neither alternative is a satisfactory one.

Effect of OLC Opinion on Specific Cases

As described above, with the rescission of the Secretary's delegation effective January 29, 1990, the OIG was compelled to withdraw from all ongoing investigations relating to the Food and Drug Administration. In total, the OIG discontinued work on 103 investigations and referred them to fellow law enforcement agencies (38) or to the OCL (65). An additional 15 cases were received by OIG after rescission of the delegation and were immediately referred to OCL. Thus, a total of 80 matters were referred by OIG to the Office of Consumer Litigation. As of mid-April, 35 of these cases were sent by DOJ to the FDA for handling. To date, 20 cases have been returned to OIG for investigation. We are continuing to consult with the Department of Justice to determine the dispisition of the remaining cases.

Following is a brief description of some of the FDA-related cases that we believe have been delayed or otherwise impeded by the reassignment of cases arising from the OLC opinion. Because these cases remain open, we have discussed them only in very general terms so as not to compromise ongoing investigations.

- The target of an OIG investigation of possible illegal distribution of steroids had ordered labels for the drugs from a printing company. An employee of the printing company alerted OIG that the target was scheduled to buy the labels. At that point, OIG was compelled to withdraw from the case and could therefore not monitor the transaction. The OCL reassigned the matter to the U.S. Attorney's office. That office contacted the FBI, Customs and the Drug Enforcement Administration, but was unable to locate any other law enforcement agency that was willing to conduct the investigation. It is our understanding that to date, no follow-up has been conducted on this investigation at all. At this point, it is probable that the steroid dealer has gone elsewhere for his labels, and the case may well be lost.

- The OIG was conducting an investigation of an individual who received HHS grant funds to conduct research on steroids. Investigation indicated that the researcher was involved with a local steroid dealer (later convicted on steroid distribution charges) who was referring research subjects to him. It also appeared that the researcher was advising the dealer in the manufacture of steroids. Again, the OIG was compelled to refer this matter to OCL. After several months' delay, OCL returned the investigation to us, but advised OIG could investigate only the grant fraud aspects of the case, and not matters concerning the unlawful distribution of steroids.

- OIG was actively engaged in an investigation of fraud on the part of a medical device manufacturer that had failed to report to FDA adverse effects and even deaths as a result of malfunctioning of their device. The case was moving quickly, with both the U.S. Attorney's office and the grand jury involved, when the OIG was forced to withdraw. OCL received the matter, reviewed it and referred it back to the U.S. Attorney's office to continue with FDA assistance. Over one month was lost in this process. Additional delays are unavoidable as FDA employees familiarize themselves with the matter and proceed with the investigation.

- The OIG has learned that several of the steroid cases we were working jointly with the U.S. Customs Service (USCS) have not been pursued because they appear to be domestic cases and therefore not within the proper jurisdiction of USCS. It is not known whether any other Federal law enforcement agency has agreed to assume responsibility for the cases.

- There has been, and will continue to be confusion surrounding those cases that involve matters both within and outside OIG jurisdiction. For example, the OIG has been conducting a Medicare fraud investigation of a durable medical equipment supplier. Our investigation disclosed that the supplier is also repackaging oxygen without a license. The OIG is nearing referral of the Medicare fraud case to the U.S. Attorney for prosecution. However, the oxygen repackaging violations will not be charged with our fraud case since we were required to refer this violation to Headquarters DOJ for handling.

Potential Effect on Other Programs of HHS

Investigation of offenses related to the Food and Drug Administration is by no means the only area of HHS operation that has been thrown into question by the OLC opinion. There are a variety of other law enforcement authorities which are the responsibility of HHS to administer, which involve persons who are not Department employees, grantees or contractors. As the only criminal investigators in the Department, the special agents of OIG have routinely conducted investigations in these areas, and referred such matters for prosecution. Examples include:

- Social Security Fraud - Section 208 of the Social Security Act prohibits the misuse of a Social Security number to obtain Federal funds, or to obtain "any other benefit to which [the offender] is not entitled, or for the purpose of obtaining anything of value from any person." In 1982 the Secretary formally transferred the responsibility for enforcing this and other offenses relating to fraud against the Social Security Administration (SSA) from SSA to the OIG. Since that time, the Inspector General has routinely conducted investigations of Social Security number fraud, and has referred for successful prosecution many, many such cases. Last year alone, the OIG assisted in obtaining more than 1,000 convictions relating to fraud in Social Security programs. Nearly 500 of these involved unlawful use of Social Security numbers.

In light of OIG's active involvement in investigation of misuse of Social Security numbers, we were extremely disturbed to learn that DOJ is examining OIG's continued authority to investigate these matters. Last week, in a conversation with an employee of the DOJ Office of Enforcement Operations, an OIG inspector inquired as to the status of four requests for OIG agents to be deputized as U.S. Marshals in cases involving fraudulent use of Social Security numbers. Our inspector was informed that the Deputy Attorney General's office had, without consulting OIG, referred these requests to the Office of Legal Counsel for a ruling as to the OIG's authority to conduct the investigations. We have confirmed this referral with the OLC, and have asked that we be given the opportunity to submit documentation in support of our continued participation in SSA investigations. We are currently preparing those materials. Nonetheless, the OLC opinion has already generated uncertainty in the enforcement operations of the largest program administered by the Department.

- Medicare and Medicaid Kickback investigations - The Social Security Act prohibits the soliciting, receiving, offering or paying anything of value as an inducement for the referral of Medicare or Medicaid business. This prohibition may reach conduct by an individual who does not directly receive any Federal funds. For example, a medical device manufacturer (such as the maker of intraocular lenses) is prohibited from offering kickbacks to hospitals or physicians where Medicare ultimately covers the cost of the cataract surgery, even though the manufacturer has no relationship with our Department. These investigations have always been the responsibility of the OIG; and the OIG has successfully investigated and prosecuted numerous such cases across the country.

- Congress has made it unlawful for a private company to use terms such as "Social Security" or "Medicare" in advertisements, where the purpose is to induce the audience to believe the company is affiliated with or endorsed by the Department. By delegation from the Secretary, OIG has been responsible for conducting investigations under this section. These cases often involve corporations that receive no HHS funds.

- The Clinical Laboratories Improvement Act (CLIA), imposes on labs a certification mechanism under which they must meet specified standards, permit inspections, submit reports, make records available and submit to proficiency testing. The Department may levy civil and administrative sanctions against offending laboratories. The statute also authorizes criminal penalties for persons who intentionally violate CLIA. The OIG has investigated alleged violations by such clinical laboratories, even when the labs received no Federal funds.

At HHS, the OIG has also been assigned a number of responsibilities for enforcement of Medicare requirements. For example, the OIG is responsible for investigating situations where physicians charge their Medicare patients in excess of their fee freeze amounts, and where nursing homes violate health and safety standards. Again, these violations are not related to the misuse of Federal funds. Moreover, given the breadth of HHS programs and responsibilities, we have no doubt that there are literally dozens of other situations in which the Department relies on the criminal investigators of the OIG to enforce HHS statutes against private parties.

Conclusion

Since the establishment of the OIG at HHS in 1977, we have viewed our mission as more broad than simply policing the conduct of HHS employees, and the expenditures of HHS dollars. Rather, we have been available to investigate fraud that threatens to inhibit the effectiveness of all HHS programs and operations. The Department has recognized OIG as a valuable enforcement resource, and has routinely referred such fraud matters to the OIG -- without regard to whether such fraud involves Federally-funded entities. We cannot overstate the fact that the OIG at HHS, and to our knowledge all other OIGs, has no desire and no ability to assume responsibility for regulatory program investigations. These investigations have and should remain with the technical experts in the program. However, where fraud is committed against any Department program, regulatory or not, the Department should be permitted to call upon the Inspector General to detect and prosecute such fraud. In this way, each agency can direct its full resources toward protecting the integrity and efficiency of its programs and operations. These programs are vital to the well-being of the American people.

REMARKS BY

JAMES R. RICHARDS
INSPECTOR GENERAL
U.S. DEPARTMENT OF THE INTERIOR

Mr. Chairman, Members of the Committee, I am pleased to appear before you today and testify on the impact of the Office of Legal Counsel (OLC) opinion on the Inspectors General (IG).

Some of the IGs do not believe that the opinion and its various interpretations apply to them, either because they have no regulatory functions in their agencies or they don't have programs that would necessitate their investigating the activities of persons external to their agencies who do not receive Federal funds. However, all of us have a deep concern about the implications of the opinion and the way that it may affect our ability to investigate fraud and abuse. In the past decade, we have developed a close and cordial working relationship with the United States Attorneys, who handle and prosecute the vast majority of our criminal cases. Quite frankly, we do not feel as comfortable with the attorneys at OLC, who have time to be more scholarly and theoretical and, unlike the United States Attorneys, have had very little experience with the criminal investigative process and other law enforcement practices and procedures. Nevertheless, we now find that the OLC has, in effect, become our general counsel.

As a lawyer and former Justice Department prosecutor, I must admit that I am confounded, confused and oftentimes frustrated by some of the advice that I have seen or heard of that is being handed out by the OLC since this opinion was issued. While the opinion may be legally defensible in a purely technical sense, it has placed the question of IG criminal investigative authority in a state of confusion and doubt.

The Office of Legal Counsel opinion said that Inspectors General may conduct criminal and other investigations which involve Federal employees, contractors, grantees and other recipients of Federal funds. It also said that IGs may investigate private parties who do not receive Federal funds when such parties act in collusion with Federal employees or other recipients of Federal funds to avoid regulatory compliance. The opinion, however, put out of bounds to the IGs so-called "regulatory investigations," i.e., those investigations that do not have any of these present. The OLC arrived at these conclusions by comparing the authority in the Inspector General Act of 1978 for the IGs to investigate fraud and abuse relating to the programs and operations of their respective agencies with the legislative history of that Act. The opinion noted that although it dealt with a dispute involving the Department of Labor IG, it would necessarily have applicability beyond that Department. That prediction has certainly come true. The OLC opinion, as it is being applied in numerous situations, has thrown the investigative authority and, in at least one instance to date, the audit authority of the Inspectors General into a state of confusion and doubt. Although the OLC opinion addresses only the issue of the authority of the Inspector General at the Department of Labor to conduct "regulatory" investigations, it has become the basis for questions about many of the Inspectors' General authority to conduct an increasingly large number of other types of investigations. And, the Inspector General at the

Railroad Retirement Board is facing questions based on the OLC opinion about whether he has authority to audit certain accounts and records of the railroads.

First, I would like to discuss several generic areas of investigation that the IGs have been involved in almost from the beginning of their existence which seem to fall outside the OLC opinion's pronouncements of IG investigative authority.

I. Fraud in the nonpayment of funds to the Federal Government.

The OLC opinion seems to say that IGs can only investigate allegations of criminal conduct committed by those who receive Federal funds by way of grants and contracts. However, the Federal government receives substantial funds through the administration of a number of programs, such as royalties, rents and other payments from the holders of mineral leases or timber contracts on the Federal domain. For example, the Department of the Interior receives between 4 and 5 billion dollars every year from such activities. When compliance reviews or other information is received indicating fraudulent conduct in the payments or underpayments of royalties or rents, or other similar payments, these matters are typically referred to the Inspector General for investigation. In fact, the Interior Departmental Manual contains a directive to employees to report fraud, waste and abuse to the Inspector General. An internal directive such as this one is fairly typical in those agencies that have an IG. Thus, IGs have usually conducted these types of investigations when they are referred to them. At the Department of the Interior and at the request of program managers, we have investigated allegations of fraudulent underpayments and false claims and statements involving both mineral leases and timber contracts. In two recent cases, which resulted in criminal convictions and large fines, the Secretary made strong public statements praising the results and noting the Department of the Interior's determination to enforce the law.

II. Impersonating an agency official or misusing an agency seal or logo in a way that defrauds a private party who is not a recipient of Federal funds.

For example, an IG has investigated allegations that an individual posed as a NASA astronaut to induce private organizations to pay him for giving speeches. In other instances, IGs have investigated situations wherein an individual used a forged agency seal on a letterhead to collect a debt from a private party, implying that this action was taken under Government authority, and individuals publicly sold items marked with a false Government logo, implying that the items were official or that the proceeds would go to the Government. And, in the Department of the Interior, as a result of our joint investigations with the postal inspectors, an individual was convicted of mail fraud for a scheme in which he impersonated a Bureau of Land Management employee and utilized the Bureau's oil and gas program to defraud victims of money.

III. Fraud in the procurement of a nonmonetary Federal benefit.

These types of cases involve such things as frauds or false statements by private individuals to obtain a Federal license, certificate, passport, patent or trademark or other nonmonetary Federal benefit.

Often, the granting of such benefits is handled by a Federal agency or organization that could be considered regulatory in nature but does not view the conduct of its function to include criminal investigations. When the organization's civil compliance reviews turn up suspicion of fraud, the program officials turn to the IG to conduct a criminal investigation.

Many IGs have investigated matters involving such false statements and, working with U.S. Attorneys, have been able to obtain many convictions. For example, over the past several years the IG at HUD has investigated a number of cases involving equity skimming in HUD's single family mortgage insurance program. The equity skimmers receive no Federal funds. Nevertheless, the IG has conducted investigations which resulted in 61 convictions and $1,955,732 in fines and restitutions.

There is great concern at the State Department concerning frauds being committed in the obtaining of passports and visas and the large-scale counterfeiting rings producing false American passports and visas which operate throughout the world. Many of those perpetrating these frauds are not receiving Federal funds or acting in collusion with Departmental employees. Therefore, the IG at the State Department appears to be precluded by the OLC opinion from conducting these investigations, although his extensive investigations of frauds committed by Departmental employees have resulted in prosecutions and termination of employees. The net result is that the integrity of the State Department's vital passport and visa program is placed in severe jeopardy.

When the IG Act was implemented at the Department of Transportation, the Secretary, acting on the express language in section 9(a)(1)(k), transferred the investigative functions of the Office of the Secretary, the Federal Highway Administration and the Federal Aviation Administration to the IG. In November 1989, the IG at DOT asked OLC for its opinion on the breadth and scope of the investigative authority so transferred. In December 1989, the OLC responded generally that the transferred authority was quite broad, but declined to discuss the specific authority of each transferred unit. Thus, the IG at DOT must rely on a case-by-case determination as to the extent of his criminal investigative authority to conduct investigations beyond the purview of the OLC opinion. The IG is understandably concerned about doing business in this manner.

Each of these areas and the investigations traditionally conducted by the Inspectors General that now appear under the OLC opinion to fall outside their investigative authority involve fraud on the government's programs and operations. Most importantly, however, and ignored entirely by the OLC opinion, some of these investigations are of frauds that pose "...substantial and specific danger to the public health and safety." Perhaps the most compelling example of such situations is that of the generic drug investigations by his office that Inspector General Kusserow of the Department of Health and Human Services is going to address here today. My own office investigated a major oil company and its drilling subcontractor for falsifying reports of required testing of blow-out safety equipment on an offshore oil rig. That investigation resulted in indictment of the two corporations involved and one individual. The seriousness of these false certifications to the Department of the Interior is underscored by the amount of the fines paid by the companies -- $1.25 million -- and the fact that the Secretary of the Interior used the occasion to strongly reiterate the Department's commitment to enforce the law governing oil and gas leases on the Outer Continental Shelf.

Such cases that involve fraud perpetrated against department or agency programs and operations which pose, as a direct result of that fraud, very serious and substantial threats to the public health and safety would appear to have been contemplated by the Congress when it enacted the Inspector General legislation. Section 7(a) of the Inspector General Act provides:

> The Inspector General may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulations ... or a substantial and specific danger to the public health and safety.

The Inspectors General and their respective departments and agencies have long believed that Congress meant what it said -- that when an Inspector General received information from an employee or official of the department or agency that the public health or safety was endangered by a fraud perpetrated against the department or agency that the Inspector General should investigate such information forthwith. Now, as recent experience indicates, that belief is cast into doubt by the OLC opinion.

Over the past decade, the IGs have been conducting investigations in all of these areas and others, at least where fraud has been alleged. After all, the agencies look upon the IGs as the fraud specialists and have generally directed their employees, and sometimes even their contractors, to notify the IG of any fraud relating to the agencies' programs and operations. The agencies, the Congress and the public expect allegations of fraud to be taken seriously and for someone to "do something about it." The FBI has criminal investigative jurisdiction over almost all violations of Federal criminal law, but their resources have to be deployed very carefully in order to cover a number of important national problem areas such as narcotics, foreign intelligence, organized crime, significant corruption and other high priority matters. The investigations I am referring to here are sometimes too small in dollar value or too specialized to be of interest to the FBI. Nevertheless, the agencies are concerned about any frauds committed against any of their programs or operations. Thus, the IGs have filled this void over the years, mostly at the request and urging of their respective agencies.

For the entire history of the Inspector General Act, the Inspectors General and the agencies wherein they are located have believed that the

Congress, in that Act, assigned the Inspectors General the responsibility and authority to investigate any fraud that violates the integrity of any program in the agencies, that is, any fraud that inhibits or prevents the program from operating as Congress intended when it established the program. Indeed, both the Inspectors General and the agencies believed that protecting the programs and operations of the agencies from fraud, waste, or mismanagement from any source was the Congress's purpose in establishing the Inspectors General. Congress did not, in most cases, set up the programs, including so-called "regulatory" programs, to investigate fraud perpetrated against the programs themselves, but to do something else, i.e., carry out their particular statutory mission -- administer and operate the national parks, contract with oil and timber companies to extract oil and harvest timber from the public lands, administer the surface mining reclamation laws, to use examples of programs within the Department of the Interior. To my knowledge, when Congress wants to establish a program whose mission is to investigate fraud, it says so in either the authorizing statute itself or its legislative history, just as it did in establishing the Inspectors General or in the now defunct Economic Regulatory Administration in the Department of Energy. Thus, when an Inspector General conducts a criminal investigation of fraud perpetrated against an agency program, be it "regulatory" or not, he is not carrying out the mission of the program, but rather he is conducting his own business, carrying out his own mission as assigned to him by the Congress.

Furthermore, when a program, "regulatory" or not, perceives that a violation of the Federal criminal fraud statutes may have been committed in the context of its operation, the program officials can call in specialized criminal fraud investigators, either the FBI or the Inspector General, to conduct the investigation. This has been the practice in agencies and departments with Inspectors General over the last 12 years. The agencies and the Inspectors General have relied on the language in the Inspector General Act to refer cases of criminal fraud against their programs and operations to the Inspectors General for investigation. This is particularly true in situations involving false claims to program officials. The agencies view this type of fraud as inhibiting their ability to carry out their legislatively assigned responsibility for their programs whether regulatory in nature or not. They do not see it as a transfer of their program operating responsibility to the Inspector General when they refer cases of fraud to be investigated by his office any more than they would envision such a transfer to the FBI if they referred such cases to the Bureau for criminal investigation. And, quite frankly, I believe that they are correct in that view.

Over the last decade, the Inspectors General have successfully conducted thousands of fraud investigations, some involving so-called "regulatory" programs, most not, some referred to them by the program officials themselves and some referred by others. To my knowledge, in not one of these investigations of fraud against their agencies has an Inspector General assumed responsibility for operating the program against which the fraud was directed. Simply put, the investigation of fraud -- a false statement, false certification, false claim against a program -- regulatory or not -- neither is nor requires assuming the responsibility for running the program itself. The OLC opinion suggests that, if an IG conducts even one investigation where Federal funds or collusion with a Federal employee is not present in a regulatory program, he has taken or assumed a program responsibility. This is not only far fetched, but it reveals a lack of understanding of what it means to "operate" a program. One only needs to read the mission statement of any Government program to appreciate the folly of such an assumption.

In concluding my statement to this Committee, Mr. Chairman, I would like to make one final observation. It seems to me that some attention ought to be paid to the better than a decade of experience in implementing the Inspector General Act. For 12 years now the Inspectors General have investigated frauds perpetrated against their departments and agencies. Many of these investigations have resulted in convictions under the criminal law -- some 4,000 per year on average during the last several years. These cases were prosecuted by the Department of Justice -- United States Attorneys, for the most part -- in the Federal courts. They were reported to the Congress and our agencies in our semiannual and other reports. Many of them have been widely reported in the public media. We have faithfully worked to carry out the will of the Congress in establishing our offices, to protect our departments' programs and operations -- all of them, whether regulatory or not --from the predation of fraud. We believe that our efforts have had some positive effect. Indeed, 2 years ago, the House Committee on Government Operations reviewed the 10 years of experience of the Inspectors General since the passage of the Act in 1978. In the report of its findings, the Committee stated that, "The inspector general concept, which was initially opposed by every agency covered by the 1978 act, is now accepted as a valuable means of protecting the integrity of government programs"; and further, "In the 10 years since the Inspector General Act of 1978 became law, the Offices of Inspector General have made substantial progress in conducting audits and investigations aimed toward improving efficiency and combatting fraud and waste in Federal programs and activities." And, as you know, Mr. Chairman, two years ago, you and all of the members of this Committee introduced legislation which was passed that not only strengthened the then existing Offices of Inspector General but extended the concept to all of the remaining Cabinet departments and to other agencies as well. This Committee, having held extensive hearings, stated in its report accompanying S. 908, "[The] Offices of Inspector General have proven successful in detecting and preventing waste and fraud in agency programs...."

Mr. Chairman, we in the IG community are proud of our work and grateful for this Committee's and the House Committee on Government Operations' recognition of the results of that work. Today, however, we are dismayed by the pall cast over that record and our ability to continue by the sterile legal opinion from the Office of Legal Counsel.

That concludes my prepared remarks. I would be happy to answer any questions that you and other members of the Committee may have.

STATEMENT OF

SHERMAN M. FUNK
INSPECTOR GENERAL
U.S. DEPARTMENT OF STATE

BEFORE THE

SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS

APRIL 25, 1990

Chairman Glenn, Senator Roth, and Members of the Committee:

Thank you for this opportunity to discuss the Kmiec opinion (hereafter called the "OLC opinion") issued in March 1989 by the Department of Justice Office of Legal Counsel.

There are a number of important issues of concern to the Inspector General community, but I am grateful that the Committee has decided to focus today on the problems generated by the OLC opinion. This is by far the most troubling issue which has faced the IGs since passage of the Inspector General Act twelve years ago, and fully warrants separate consideration by the Committee.

The OLC opinion is particularly troubling in four respects.

First, both explicitly and by implication, it establishes arbitrary, unrealistic and unworkable limits on the investigative jurisdiction of the IGs. Second, by seeking to fix something which isn't broken, it violates one of the oldest and soundest principles of management. Third, it is inconsistent with the IG authorities laid out in the Program Fraud Civil Remedies Act of 1986. And fourth, it is driving a wedge between two natural and closely cooperative allies, the Department of Justice and the IGs. I should like to briefly discuss each of these points.

Let me begin by stating the obvious: the IG Act establishes limits on the jurisdiction of the IGs. We are constrained by law to working only on those matters which relate, in the language of P.L. 95-452, to the "programs and operations" of our establishments. There may be legitimate debate on just what this entails, but the overwhelming consensus among the IGs is clear: we are not mini-FBIs, free to investigate Title 18 violations outside of our agencies. This is the chimera, the bogeyman, raised by the OLC opinion, a picture of the IGs as rogue cops.

To be sure, OLC perceived this to be a danger in the case of one department, and its opinion purported to be limited, factually and legally, to that one department. Indeed, in a letter to me last September, the Acting Deputy Attorney General emphasized that the opinion applied only to that department, in effect asking, therefore, what all the fuss was about. Unfortunately, the criteria established by OLC ostensibly to deal with that one case, and the actions by the Justice Department since then, strongly imply a far more expansive application to all IGs and would have a considerably more restrictive impact.

In essence, the OLC opinion limited IG external investigative authority to two areas: where we had reason to believe there was fraudulent collusion between employees of our agencies and external parties, and/or fraud by recipients of monetary benefits from our agencies, e.g., contractors, grantees, or borrowers. If these in fact were to be our sole external jurisdictions, it would exclude from IG purview all of the following:

o fraud relating to non-monetary benefits, such as false statements on applications to obtain a federal license, certificate, job, visa, passport, permit, or other benefit -- even though the result of such fraud would be illegal enrichment or subversion of the system;

- fraud not relating to receipt of federal money but rather to the non-payment or underpayment of funds owed to the government, such as monies owed for coal, gas, timber or grazing fees;

- fraud relating to false certifications, applications, testimony, etc. which results in unwarranted dangers to public health and safety; and

- fraud in the impersonation of a federal official or the misuse of an agency seal or logo in a way that defrauds a third party.

If my colleagues and I were not to investigate the above, we would be failing to do our job; indeed, we would be guilty of nonfeasance. I might add that, in the last category above, I (and, I suspect, my colleagues) often receive referrals from Members of Congress of complaints from irate constituents about misuse of agency seals and logos. I am tempted, frankly, the next time I get one of these to go back to the Hill and say, "Sorry, I can't touch this because it doesn't involve a direct monetary benefit." However, as long as I can lawfully do so, I shall resist that temptation.

OLC adopted a tortuous rationale to exclude the above areas from IG jurisdiction. It assumed that an IG investigation of an "external party" -- that is, an investigation not involving federal employees or dollars -- would be a "regulatory investigation" that automatically would immerse that IG in a "program operating responsibility," which it properly said is beyond the scope of the IG Act. None of us would disagree with OLC that this is something we have to avoid, lest we lose the objectivity and independence which must characterize our work. But this is a classic case of setting up a strawman in order to demolish it. In fact, there is not a whit of intrinsic difference in the methodology of investigating external parties as compared to internal parties. I certainly have never converted any of my internal investigations into a "program operating responsibility," and I cannot conceive of doing so in an external investigation.

I should note also, in this connection, that no IG to my knowledge has any desire to engage in regulatory compliance activity. Aside from the very real philosophic objections we have to such efforts, there are equally real pragmatic objections: we do not have either the time or trained people. Simply put, we have bigger and more immediate fish to fry. OLC's fear of this is a classic case, as I noted earlier, of fixing something that ain't broke.

My third point is that the OLC opinion contradicts the statutory mandate laid on the IGs by the Program Fraud Civil Remedies Act of 1986 to investigate false claims and statements. For Program Fraud purposes, a "claim" is defined as "any request, demand, or submission...made to an authority for property, services, or money...." This flies in the face of Kmiec, which would limit the scope of IG activity only to those areas where there are federal monetary benefits, or where there has been collusion by external parties with employees of our own agencies. I find it passing strange that the OLC opinion fails to address the apparent conflict with the Program Fraud Civil Remedies Act. I find it difficult to understand why an IG would be given authority to investigate administratively what he cannot investigate criminally. This stands common sense on its head.

Finally, it is unfortunate that the OLC opinion has resulted in a divisive Justice Department-Inspector General environment, although this should not be magnified out of context. To say that we are allied to Justice understates the matter. There is a symbiotic relationship between us which is immensely valuable to both sides. Last year, Assistant U.S. Attorneys and the Criminal Division of the Justice Department together successfully prosecuted some 5600 criminal cases made by the IGs or, in some instances, made jointly by the IGs and other law enforcement agencies, chiefly the FBI. In the investigative arena, we would be frozen dead in our tracks without Justice and the U.S. Attorneys. Once an indictment is sent up, for all intents and purposes we function as an arm of an AUSA or a trial attorney in the Criminal Division.

But there is another reason why it is imperative that we continue to work in harmony with Justice. That department defines the conditions under which it will represent federal employees who are sued in their official capacity. Thus, if an OIG is operating in an area questioned by the OLC opinion, and Justice therefore decides that the conduct in dispute is outside the scope of an investigator's legitimate authority, Justice could refuse to represent the IG employees in litigation. Given the cost of obtaining private counsel, and the size of potential judgments, this would have a chillingly repressive effect upon OIG investigations. I understand that exactly such an indication already has been voiced orally by Justice to employees of an OIG, so that this is by no means just an academic fear.

In terms of the impact of the OLC opinion on my own shop, it would limit my authority to conduct visa and passport investigations to those cases which implicate State Department employees or recipients of Department funds. Thus, we could investigate private or external parties only when they act in collusion with Department employees, contractors or grantees. We would be precluded -- OLC says we already are precluded -- from investigating visa and passport fraud perpetrated by external parties, including large-scale visa "brokers" and counterfeiting rings.

I note that, in my current and last semiannual reports to the Congress, I cited visa/passport fraud as one of the few major vulnerabilities in State Department operations, requiring both immediate action and long-term followup. We are addressing it aggressively. In the past six months, many Foreign Service National employees have been fired and/or referred for local prosecution. Indeed, in two of our major embassies, the consular FSNs have been virtually wiped out. From an investigative standpoint, it is not only ineffective but a practical impossibility to draw a hard and fast line at the doors of our embassies and consulates. That would be tantamount to the Secret Service being able to investigate those who push counterfeit currency, but not those who print it.

The Bureau of Diplomatic Security has specific legislative sanction to conduct visa and passport investigations, and in most of our major cases in these areas we work jointly with their agents. But that bureau's primary responsibility is security; in today's world overseas, that properly takes up most of their time. The bureau has very few criminal investigators devoted solely to fraud. If we are compelled to pull back, it will leave a gaping hole and badly exacerbate an already grave vulnerability.

When I testified before this committee last fall, I said I was hopeful that discussions then under way between the PCIE and the Justice Department would develop a resolution of the difficulties arising from the OLC opinion. By that time, representing the PCIE, I had met on several occasions with Mr. Barr, the Assistant Attorney General for Legal Counsel. I had presented a paper listing those areas which, when suitably clarified, would correct what I believed were the basic misconceptions in the opinion. Essentially, these were the same areas I noted in the early part of my testimony today. I regret that there was no forward motion after these meetings.

Later, reflecting the clear wishes of the PCIE to resolve the issues without a confrontation, the Council voted unanimously to proceed with negotiations. At that point, I formed an ad hoc committee of the PCIE to meet with Justice, consisting of Jim Richards, IG of Interior, John Martin, IG of EPA, and myself. The three of us met with two Associate Deputy Attorneys General, most recently on January 23, 1990. On February 22, I reminded the Deputy Attorney General about our deep concern about the OLC issues, and urged prompt action by his department to resolve them. Last month, with the status quo remaining unchanged and no sign of movement, I gave up.

As an old Washington hand, I am very reluctant to seek legislative relief from bureaucratic problems. My experience is that legislation all too often opens the door to a host of amendments which may well create difficulties greater than the problem the legislation was designed to correct. Also, it is entirely possible that legislation can produce consequences way beyond anything consciously intended. I therefore am generally inclined to negotiate a compromise solution rather than roll the dice on a new bill. In the case of the OLC opinion, however, my negotiating lance has been thoroughly blunted. I believe that legislation _is_ required, and indeed is necessary to preserve the integrity of the Inspector General Act of 1978.

This concludes my statement. I would be happy to answer any questions the Committee may have.

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Testimony of

PAUL A. ADAMS

INSPECTOR GENERAL

U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you today to discuss the opinion rendered by the Department of Justice's Office of Legal Counsel (OLC) concerning the investigative authority of the Inspectors General.

We have carefully examined the opinion by Mr. Douglas Kmiec, Assistant Attorney General, OLC. We believe the opinion is completly contrary to the statutory authority provided in the Inspector General Act. Specifically Section 6(a) of the Inspector General Act of 1978 (P.L. 95-452; 5 U.S.C. app.) provides the Inspector General authority "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are in the judgment of the Inspector General, necessary or desirable...." This authority vested in the Inspector General includes that "to conduct and supervise ... investigations relating to the programs and operations" of their Departments or Agencies.

The Inspector General Act prohibits transfer of "program operating responsibilities" to the Inspectors General and I wholeheartedly agree that IG's should not have such responsibilities. Although the Congress has not defined "program operating responsibilities," the OLC in its March 9, 1989, memorandum to the Department of Labor's Acting Solicitor, defined "program operating responsibilities" as involving an agency's "regulatory" jurisdiction. There is also some indication that the OLC would restrict Inspector General investigative authority to situations involving receipt of monetary benefits or government employees. We do not believe the Inspector General Act or its legislative history supports the imposition of these limitations. We have no intention of usurping our Department's regulatory authority, but situations often arise in which an Inspector General investigation has a broader scope, with a wider range of sanctions, than the regulatory program itself. While regulatory investigations normally consider administrative sanctions, Inspector General investigations also are conducted for criminal prosecution purposes which may not always be available to the regulatory administrators.

The OLC opinion interprets the investigative authority of Inspectors General as essentially covering only agency employees, contractors, grantees, and other recipients of Federal funds from the agency. This decision, if left standing, could have far reaching implications for the Inspector General community and the taxpayer who looks to the government to effectively address problems of fraud and abuse in government programs.

There is one pervasive problem in HUD programs which we will not be able to address if the OLC opinion not is revised and is strictly interpreted as applying to all Inspectors General. This concerns equity skimming in the single family mortgage insurance program. Equity skimming is a fraud scheme in which an individual who is typically an investor obtains a deed for a property that is subject to an FHA-insured or VA-guaranteed mortgage. In other words, the mortgage had been originally obtained by another individual. The investor then moves renters into the property, collects rent, does not apply the rent to the mortgage payments, and allows the mortgage to go into default. The Federal government then is required to pay the claim. Equity skimming is, a violation of Federal criminal law under title 12, U.S. Code, Section 1709 when a person engages in this pattern of behavior.

Equity skimming is a major concern facing HUD's single family mortgage insurance program. In our office alone, we presently have close to 200 pending investigations which involve equity skimming and FHA-insured mortgage loans. In the past four years, there have been criminal charges brought against approximately 100 individuals for equity skimming throughout the United States. The losses to the Federal government, because of equity skimming, are enormous. For example, In Seattle, two individuals, who were prosecuted, collected $115,000 in rents for 36 properties where government losses through foreclosure were over $700,000. In another recent Seattle case, five people were indicted for equity skimming involving 80 properties in which they collected at least $190,000 in rents, and losses to the government already are approaching $424,000 on 20 of the properties.

In Chicago, a real estate agent was convicted after he engaged in equity skimming on 15 properties in which the losses to HUD were approximately $200,000.

In Great Falls, Montana, a businessman was prosecuted for skimming more than $100,000 in rents from over 40 properties in a six month period. HUD's losses are estimated at over $800,000.

In Los Angeles, four individuals were prosecuted after they collected over a million dollars in rents on more than 300 properties. Approximately 60 of these properties had HUD-insured or VA-guaranteed loans. Total losses exceeded one million dollars as a result of the equity skimming scheme.

What is interesting to note is that equity skimmers receive no Federal funds or benefits and have no direct involvement with the Federal government or contact with Federal employees. Applying the guidelines set forth in the OLC opinion, one might conclude my office has no authority to investigate these matters. My only option would be to refer any suspected violations to the Federal Bureau of Investigation. This is not a satisfactory solution because:

(1) In most of the areas where the major violations have occurred, the FBI resources are already heavily committed to fraud in the savings and loan industry, defense procurement and drug problems.

(2) Investigations by the FBI will require continued support from our office which according to the OLC opinion has no authority to conduct such investigations.

To the best of my knowledge, no other law enforcement agency or program administrator has any responsibility for developing this type of case. Moreover, there must a means of reporting the abuses to Congress so that it be kept informed and be in a position to act knowledgeably.

As the uncertainty caused by the OLC opinions lingers, a disturbing problem is developing. This opinion and the surrounding confusion is having a chilling effect on our staff.

They believe their authority has been placed in doubt and are concerned as to whether they are acting within the scope of their authority; therefore beomg personally liable. This doubt must be removed if we expect our employees to perform their duties.

This situation will only grow worse if some action is not taken to clarify the confusion caused by this opinion.

Dealing with problems on a case by case basis is unacceptable because of the many and varied fact situations involved. Each day presents new situations not previously anticipated in which our employees are confronted with doubts as to their authority.

While I believe the Act clearly provides the authority, others have raised sufficient doubt that action by the Congress is required in order resolve the matter. Consequently, I believe the only solution is legislative action by the Congress.

This concludes my prepared remarks. I will be pleased to answer any questions you may have.

REMARKS BY

JOHN W. MELCHNER
FORMER INSPECTOR GENERAL
U.S. DEPARTMENT OF TRANSPORTATION

Mr. Chairman and members of the committee, thank you for inviting me here today to meet with you to discuss the impact of the Office of Legal Counsel (OLC) memorandum on the authority of the Inspector General (IG). I don't believe I need to cover the specifics of the memorandum, as I expect it will be fully covered elsewhere in this hearing.

In November of 1989, I requested a clarification of the OLC opinion as it applied to the Department of Transportation (DOT), Office of Inspector General (OIG). I took that action because the OLC opinion recognized that where other investigative authorities were transferred to the Office of Inspector General at the time it was created, those authorities may continue to be exercised. When the OIG was created in DOT, investigative resources were transferred from the Office of the Secretary, the Federal Highway Administration, and the Federal Aviation Administration (FAA). I believed it was vitally important to clearly establish that those investigative authorities continue to exist in the DOT/OIG.

On December 19, 1989, Assistant Attorney General William P. Barr, Office of Legal Counsel, responded to my request. He stated, "Subject to the caveat that this letter must not be understood as specific approval of any particular investigation or category of investigations for a particular program or operation it is our view that, pursuant to section 9(a)(1)(k) of the Act, you possess the same broad authority to investigate fraud against DOT that the various investigative units that the Act transferred to your office at the time of the transfer." He went on to say, "In light of this conclusion, it is unnecessary at this time to decide whether the provisions of the Act that set forth the general authority of all Inspectors General also authorize such investigations."

There are two aspects to the December 19, 1989 memorandum, which I found troubling. First, the opinion provided that I did have those broad investigative authorities that were transferred in, but then cast a cloud on that positive statement by stating that the opinion was not a specific approval of any particular investigation or category of investigation for a particular program or operation. I remember characterizing the opinion to a colleague at the time somewhat as follows:

> "You have what you have, and that's all that you have, but we are not going to tell you what that is unless you ask us on a case-by-case basis."

I can understand an OLC opinion that would caution that while the authorities are broad, they are not unlimited. I cannot understand why they had to cloud the opinion with the exacting requirement that OLC rule on each instance on a case-by-case basis.

The second aspect that is troubling, and in fact has the potential for real mischief, is in one of the closing paragraphs of the letter. I'll quote:

> "While it would appear that collectively the authority that transferred to the DOT-IG with the various investigative units was quite broad, it is beyond the scope of this letter to discuss specifically the authority of each transferred unit. If you have any such specific questions, you should raise them in the first instance with agency counsel, who have expertise regarding the relevant statutes and programs."

In effect, this statement could be interpreted as giving agency General Counsels the primary responsibility for interpreting an agency Inspector General's authorities. I hope that was not what OLC intended, especially in the light of the current debate over whether agency Inspectors General have the authority to appoint their own legal counsels.

While it would be inappropriate for me to cite specific examples of cases that might fall outside this opinion, or even speculate on such cases, I do support the conclusion that there will be cases which fall outside the opinion, or more likely, in some gray area in between. Another way I can answer this question is to recite the examples we used in our November 1 memorandum to the OLC. Had we not had the investigative authorities transferred to the OIG, the investigations of pilots who lied to the FAA on their medical records certificate concerning convictions while driving under the influence would have fallen outside the OLC guidelines. Similarly, the investigation of the use of falsified FAA documents to obtain approval for the construction of a radio tower would have been outside these guidelines. This case, which we did not include as part of the November 1, 1989 memorandum to OLC, had, in fact, been approved as within our investigative authority by OLC because we informed the Assistant United States Attorney (AUSA) handling the case of the March 1989 OLC opinion. The AUSA then obtained an opinion from OLC that the case was within our investigative authority based on the transfer of the FAA investigative authorities. There is nothing in writing on this to the best of my knowledge, but that is how I am told we proceeded with the investigation on that case.

I believe the DOT/OIG had proper investigative authorities for the cases that we investigated while I was IG. However, given the caveat to the OLC opinion that I received, it strengthens the potential for challenges to OIG investigative authority. If we judged wrong and some court were to conclude that we did not have investigative jurisdiction, it is possible that there could be some personal tort exposure. As more and more debate occurs over this issue, and more and more attention is drawn to it, IG personnel may want to have an opinion on the propriety of their jurisdiction in each case in order to assure that the Justice Department will defend them should a personal tort case be filed. This, coupled with the notion that agency General Counsels should provide this initial advice, could quickly get to the heart of IG independence.

In conclusion, I hope I've provided a balanced assessment of the opinion and its impact as I saw it. It seems to me that this is a perfect example of nothing being broken, but somebody deciding to fix it. I would urge a return to the status that existed before the March 1989 OLC memorandum. Failing that, I would urge this committee to introduce legislation which would clearly and unequivocably establish the IGs' independence, the right to appoint counsel, and to determine the full scope of IG investigative authority.

That concludes my remarks. I would be happy to answer any questions.

STATEMENT OF WILLIAM P. BARR
ASSISTANT ATTONEY GENERAL
OFFICE OF LEGAL COUNSEL

Thank you for this opportunity to testify about the Department of Justice's views on a number of legal issues concerning the authority of the Inspectors General (IG). As you know, the Department's Office of Legal Counsel issued an opinion on March 9, 1989, concluding that the IG of the Department of Labor lacked authority to conduct regulatory investigations that are an integral part of the programs administered by that Department. Let me first discuss the background and rationale of the Opinion and then turn to some questions about its application. When I have finished, Stuart Gerson, the Assistant Attorney General for the Civil Division, will discuss the actual impact of the Opinion on law enforcement.

The OLC Opinion grew out of a dispute between the Solicitor and the Inspector General of the Department of Labor. When the Solicitor requested OLC to issue an opinion on the IG's authority, we first tried to limit ourselves to the specific situation that had led to the dispute. However, the Solicitor advised us that the dispute was not confined to any specific statute or set of facts, but concerned the IG's general authority regarding alleged violations of any statute administered or enforced by the Department of Labor. The OLC Opinion necessarily dealt with principles broad enough to cover the dispute as presented to us.

After considering the legal arguments submitted by the Solicitor and the IG, OLC issued an opinion concluding that the Act does not generally vest in the IG of the Department of Labor the authority to conduct investigations into alleged violations of the regulatory statutes administered by that agency, such as the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, and the Occupational Safety and Health Act, 29 U.S.C. §§ 651-678. Underlying the Opinion was a distinction between, on the one hand, the oversight role that IGs properly perform by investigating the manner in which agencies discharge their responsibilities and, on the other hand, "a direct role in investigations conducted pursuant to regulatory statutes" (Opinion at 1), which IGs may not undertake.

On its face, the language in the Inspector General Act of 1978 that defines the authority of IGs is not particularly clear. The Act empowers IGs to conduct investigations "relating to the programs and operations" of their agencies, 5 U.S.C. App. § 4(a)(1), and to take action for the "detection of fraud and abuse in such programs and operations," id. § 4(a)(2). To interpret the meaning of such language, the OLC Opinion turned to the legislative history of the Act.

The Opinion pointed to legislative history that supported the distinction between an oversight role and a direct role in investigations under regulatory statutes. Congressman Levitas, for example, stated

> The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibility to divide allegiances. The Inspectors General will be responsible for audits and investigations only . . . . Moreover, the offices of Inspector General would not be a new 'layer of bureaucracy' to plague the public. They would deal exclusively with the internal operations of the departments and agencies. Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.

124 Cong. Rec. 10,405 (1978).

In particular, the legislative history compels the conclusion that IGs do not have authority to conduct investigations that are an "integral part" of the agency's programs:

> While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and the prevention and detection of fraud and abuse in such programs, they would not have such responsibility for audits and investigations constituting an integral part of the programs involved. Examples of this would be audits conducted by USDA's Packers and Stockyards Administration in the course of its regulation of livestock marketing and

> **investigations conducted by the Department of Labor as a means of enforcing the Fair Labor Standards Act. In such cases, the Inspector General would have oversight rather than direct responsibility.**

H.R. Rep. No. 584, 95th Cong., 1st Sess. 12-13 (1977) (emphasis added).[1] Thus, where an agency's compliance and enforcement unit has authority to detect and investigate non-compliance under a regulatory statute such as the Fair Labor Standards Act, the IG may not supplant the work of that compliance and enforcement unit. If the agency unit is not performing its responsibilities effectively, the IG has full authority to report on the shortcomings and recommend improvements. But the Act, as the legislative history makes plain, does not enable the IG to undertake himself the investigative tasks that Congress has made an integral part of the agency's programs.

This conclusion comports with one of the primary purposes behind the Inspector General Act, namely that IGs be independent and objective. See, e.g., H.R. Rep. No. 584 at 15. Under the Act, IGs are not to conduct the day-to-day operations of the agencies whose honesty and efficiency they must oversee. IGs, in short, are not to be put in a position where they must oversee themselves. An IG should have "no conflicting policy responsibilities which could divert his attention or divide his time; his sole responsibility is to coordinate auditing and investigating efforts and other policy initiatives designed to promote the economy; efficiency and effectiveness of the [agency's] programs . . . ." S. Rep. No. 1071, 95th Cong., 2d Sess. 7 (1978). The OLC Opinion sought to be faithful to this Congressional purpose of providing for independent IGs who are detached from the day-to-day development and implementation of policy in agency programs.

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[1] In addition, section 9(a)(2) of the Act forbids delegating to IGs any "program operating responsibilities."

It would be contrary to the whole purpose of the Act -- and profoundly ironic -- if the Act were interpreted so that IGs would give up their impartial and independent roles, assume policy and operational responsibilities for agency programs, and become another "layer of bureaucracy" in the federal government. See 124 Cong. Rec. 10,405 (1978) (statement of Cong. Levitas). In that event, an Act aimed at economy and efficiency would create a duplicative establishment within an agency to do the same tasks that Congress had directed the agency to perform.

Moreover, it is hardly surprising that Congress did not provide the IGs with authority to undertake regulatory investigations as they chose, because to invest such authority in the IG would have circumscribed the power of the head of the department or the official designated by statute to control a department's regulatory policy. Regulatory enforcement policy necessarily requires complex choices about resource allocation and prosecution priorities. The IG may legitimately conduct oversight review of such enforcement policies and may criticize them, but he does not have authority to change these policies through choosing his own investigations. It is no answer to say that the IG may be required to follow the policies laid down by the officials responsible, because application of these policies to particular facts necessarily requires judgment and the policies themselves will be continually reevaluated in light of the experience gained in their application. Thus, Congress wisely chose to leave regulatory enforcement decisions under the operational control of the agency's official responsible for regulatory enforcement.

As the Opinion and subsequent advice of OLC have made clear, an IG does have wide and suitable investigative authority. For example, an IG may investigate not only the actions of the agency and its employees, but also alleged wrongdoing by private parties acting in collusion with such employees. In the course of an oversight investigation, an IG may also conduct "spot checks" of agency actions, by investigating particular instances in which regulated persons have failed to comply with regulatory requirements. Furthermore, an IG may investigate the recipients of federal funds, such as contractors and grantees, since the legislative history demonstrates a special concern with financial wrongdoing. S. Rep. No. 1071 at 27 ("The [Inspector General's] focus is the way in which Federal tax dollars are spent by the agency, both in its internal operations and its federally-funded programs"). And grandfather provisions of the Inspector General Act specifically give additional investigative authority to IGs in many agencies. The OLC Opinion simply declares, in accordance with the plain legislative intent, that an IG may not take over the programs that the agency is charged with administering, by conducting the investigations that form an integral part of such programs.

In response to generalized expressions of concern by some IGs about their investigative authority in light of the OLC Opinion, on September 11, 1989 the Department sent a letter to all IGs inviting inquiries from any IG who is concerned that the Opinion might constrain his ability to carry out any investigation he believes he has authority to carry out. We made it clear that we would work with any such IG to consider how the Inspector General Act and any other statutes governing that IG's authority apply to specific types of investigations -- as well as ways of structuring specific investigations in light of the authority of the various investigative bodies that might be available.

To date the IGs of the Transportation, Health and Human Services, and Labor Departments have responded to our invitation. We promptly provided them with advice that addressed their concerns and made it clear they could carry out the types of investigations they had inquired about. There was no need in those instances to consider alternative ways of structuring investigations because we advised the IGs that they had the requisite authority.

Chairman Glenn's letter of invitation for the hearing today raises some questions about the OLC Opinion's conclusions in light of other provisions of the Inspector General Act and the later-enacted Program Fraud Civil Remedies Act of 1986. These provisions do not alter our conclusions.

The letter points out that IGs "are empowered to investigate a variety of matters reported by 'whistleblowers.'" In particular, Section 7 of the Inspector General Act provides that an IG

> may receive and investigate complaints or information from an employee of the establishment concerning the possible existence of an activity constituting a violation of law, rules, or regulation, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety.

5 U.S.C. App. § 7(a). Furthermore, the IG may not reveal the identity of the employee unless the disclosure is "unavoidable," 5 U.S.C. App. § 7(b). Chairman Glenn's letter states that this requirement could "mak[e] it problematic for any other office to undertake the investigation." The letter suggests that Section 7

thus calls for IG investigations that would be outside the scope recognized as proper by the OLC Opinion.

Because the type of investigations discussed in the OLC Opinion did not result from "whistleblowing" by agency employees, the Opinion did not interpret Section 7. By its terms, Section 7 applies only when an agency employee has conveyed a complaint or information to an IG. In the absence of such a communication from an agency employee, Section 7 could not, even on the most generous reading, be the basis for an investigation by an IG. Thus, it cannot disturb the general conclusions of the OLC Opinion.

In fact, OLC has never been asked to interpret the scope of the whistleblower provision. Generally, it is most productive to interpret statutes in the context of specific facts that can sharpen and illuminate the issues, and I would be reluctant to state any definitive position about Section 7 in the abstract. However, in a tentative way, I can outline some of the considerations that should help to shape an interpretation of Section 7.

The overriding intent behind the section was to provide a secure channel to the IGs for whistleblowers. Congress noted that "it is never easy to 'blow the whistle' on one's supervisors or colleagues," S. Rep. No. 1071 at 35, but that "the employees of an establishment can be valuable sources of information about fraud, waste, and mismanagement within the agency," id. at 36. The OLC Opinion expressly recognized that IGs have authority to investigate the actions of agencies and their employees. Given that the legislative history of this section suggests that it addresses internal problems caused by an agency's dereliction of duty, I am skeptical that the provision would generally authorize investigations going beyond the broad range of investigations already discussed. However, our office cannot opine on this issue without a concrete case in which the IGs and other interested components of the government could make their views known.

Chairman Glenn's letter also notes that the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. §§ 3801-3812, empowers IGs to investigate certain false statements or claims submitted to the government. The sanctions levied under that Act, however, are administrative in nature. Thus, the Act does not give an IG authority to seek civil or criminal sanctions in regulatory compliance programs. The OLC Opinion did not address any authority for administrative investigations that an IG might exercise under that Act. Where an IG has authority under that statute, the Opinion does not limit that authority in any way.

Let me now turn to an issue concerning the scope of the OLC Opinion. Noting that the OLC Opinion addressed a situation where the IG at the Labor Department asserted inherent authority under the Inspector General Act to conduct regulatory investigations, Chairman Glenn's letter asks whether the OLC Opinion also precludes an agency head from delegating such authority to an IG pursuant to Section 9(a)(2) of the Act. The OLC Opinion expressly answered that question in the affirmative (Opinion at 11-12). The immediately preceding subsection of the Act (Section 9(a)(1)) transferred to the newly-established IG Offices a number of existing government offices that performed audit and investigative functions. Consistent with the transfers made by that subsection, Section 9(a)(2) also transferred to the IG Offices

> such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act, except that there shall not be transferred to an Inspector General under [this subsection] program operating responsibilities.

Since an IG is precluded under the Act from conducting regulatory investigations, it follows that the agency head cannot delegate such authority to the IG, because it is not "properly related" to the IG's statutory functions and would not "further the purposes of this Act," as required by Section 9(a)(2).

Because of the preceding conclusion, it was not necessary for the OLC Opinion to discuss explicitly the question of whether the conduct of regulatory investigations also constitutes a "program operating responsibility," the delegation of which to an IG is prohibited under Section 9(a)(2). We believe that an affirmative answer to that question was implicit in the rationale of the OLC Opinion and wish to make it clear to the Committee today that that is our view. As previously stated, Congress intended that the IGs would oversee but not conduct agency operations, and we find no basis in the Act or its legislative history for concluding that agency regulatory investigations should be treated any differently in this regard from any other agency operations.

This conclusion is supported by the discussion of Section 9(a)(2) contained in the House and Senate reports on the Act. See H.R. Rep. No. 584, 95th Cong., 1st Sess. 15 (1977) ("In order to prevent compromising the independence and objectivity of the Offices of Inspector General, transfer of program operating responsibilities to the offices is prohibited."); S. Rep. No. 1071, 95th Cong., 2d Sess. 38 (1978) (substantially identical language). In our view, Congress' interest in preserving the IGs' "independence and objectivity" regarding oversight of an agency's regulatory investigative operations would certainly be threatened if an IG were to undertake some of those operations himself, thereby putting himself in the position of overseeing his own performance of an agency function.

The legislative history of the 1988 amendments to the Act demonstrates a congressional understanding that is fully consistent with this conclusion. In responding to concerns that extending the Act to the Department of Justice would interfere with the Department's investigative and law enforcement functions, the House report stated that:

> A simple extension of the 1978 act to include the Department of Justice would not result in a direct and significant distortion and diffusion of the Attorney General's responsibilities to investigate, prosecute, or to institute suit when necessary to uphold Federal law. The investigation and prosecution of suspected violations of Federal law and the conduct of litigation are parts of the basic mission or program functions of the Department of Justice. The 1978 act does not authorize inspectors general to engage in program functions and, in fact specifically prohibits the assignment of such responsibilities to an inspector general.

H.R. Rep. No. 771, 100th Cong., 2d Sess. 9 (1988) (footnote omitted). Just as the 100th Congress understood the Act to prohibit the Justice Department IG from being assigned the "program function" of investigating suspected violations of federal law, we understand the Act to prohibit any IG from being assigned pursuant to the Act the function of investigating suspected violations of a regulatory statute, where investigating such violations is an integral part of the agency's programs.

Chairman Glenn's letter suggests that the OLC Opinion rests on Congressional intent and asks whether there is any bar to Congress' clarifying that intent. As long as the President retains control over the appointment and activities of the IGs, there would, in principle, be no constitutional bar to expanding the IGs' jurisdiction into the areas where the OLC Opinion concluded that the Act now excludes the IGs.[2] But Congress can clarify its intent -- or, more precisely, can reformulate the intent of a previous Congress -- only by passing another statute. Congressional intent can legitimately be inferred from the language, structure, and history of a law because the entire Congress has had an opportunity to examine all of these matters during the course of passage and has then voted on the bill and presented it to the President for his consideration. Therefore, although Congress may amend or clarify the Inspector General Act, it may do so only through the process for enacting a law as provided in the Constitution.

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[2] Of course, we would need to review any specific language expanding IG jurisdiction, in order to determine whether other constitutional issues that we cannot now foresee have been raised.

I will close, Mr. Chairman, by stating that we remain convinced that the OLC Opinion sets forth the correct interpretation of the scope of Inspector General investigative authority under the Inspector General Act. I look forward to answering your questions about the Opinion and my testimony, but with your permission we would appreciate the opportunity for Stuart Gerson first to present the Department's testimony concerning the actual impact of the Opinion on law enforcement.

STATEMENT OF STUART M. GERSON
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

We welcome this timely opportunity to discuss the views of the Department of Justice on various issues dealing with the authority and role of the Inspectors General of the various Executive Branch components, and to reiterate our firm commitment to supporting these officials and, most of all, to fighting fraud and corruption wherever it might be found.

Indeed, in the time that I have been the Assistant Attorney General for the Civil Division, I believe that there has been extremely useful and effective cooperation with the Inspectors General, especially in the areas where fraud can be the most costly: defense and federally-guaranteed health services.

For example, with the cooperation of the Inspector General for the Department of Defense, we have successfully attacked overseas bid-rigging in military contracts and we are actively engaged in suits involving allegations of falsified testing results and other forms of defense fraud.

With the critical assistance of the Inspector General of the Department of Health and Human Services, the Civil Division has made a good start in cases designed to vindicate the congressionally-mandated policy that Medicare must be a secondary payer when other forms of health insurance are available. These cases could save the public treasury many millions of dollars, and the working relationship with the IG, by his account and mine, has been highly professional and effective. We believe that our offices also are working effectively with regard to food and drug regulation and other areas of mutual interest and jurisdiction.

Notwithstanding the clearly documentable success of the coordinated work of the Justice Department and Inspectors General, there has been some confusion generated by the legal opinion rendered by the Department's Office of Legal Counsel. While the Assistant Attorney General for that Office, my colleague Mr. Barr, is here today to explain that opinion and its ramifications, I note two things about it.

First, the scrutiny that it has gotten has been centered on one form of case in a single department. That is a testament to the fact that the Inspectors General as a whole have no difficulty exercising their jurisdiction effectively. Second, even in one area of inquiry, i.e., Food and Drug Administration matters involving the IG of the Department of Health and Human Services, the cases are proceeding with reasonable dispatch. Moreover, because of the option of detailing employees, Inspector General personnel have not necessarily been displaced from these matters.

Nevertheless, if there has been doubt or confusion, either by some Inspectors General or by other segments of government, then part of our goal today is to eliminate that uncertainty.

Assistant Attorney General Barr has presented the legal rationale underlying the OLC Opinion. I shall inform you of how we are actually working on cases in view of it.

It is natural and necessary to focus on the specifics of Inspector General authority. However, fully to appreciate the soundness of the views expressed by the Department of Justice, it might be better first to step back to look at the overall concept of an office of Inspector General. A broader perspective also will assist in explaining the corrective steps that we have suggested could be taken to further investigations which might be technically outside of the general authority of an Inspector General, but where it is desirable to continue the IG's involvement.

An Executive Branch Department's traditional investigators can be analogized to a police force. The Office of Inspector General, created by statute in 1978, established in-house investigators, a segregated internal affairs arm, if you will, to make certain that fraud, waste and abuse within that police force are ferreted out and lead to punishment. That of course is not their only function, as Inspectors General not only police the regulators' actions, but have the additional roles that in greater detail have been described by Mr. Barr. Of particular importance, IG's become the "front-line" investigators as to possible wrong-doing by recipients of federal funds, such as contractors and grantees.

This police of the police are responsible for assuring that the traditional investigators faithfully perform their roles in pursuing criminal conduct and are not themselves violating the law. However, if the "watch-dog" investigator entirely supplants the main-sequence investigator, the very potential abuse that the IG system is designed to uncover necessarily will go undetected. The Inspector General's purpose cannot be served if the Inspector General takes over the integral programs administered by an agency.

We have no reason to doubt that Inspector General personnel are as honest and dedicated as any public servants. We likewise believe that most federal agency employees are well-intentioned. There either is or is not a reason for an Inspector General system in the first place. Once it is determined that a sentinel is needed to detect the malfeasance of those given responsibility for specific categories of investigations, that very determination answers whether one group cannot be both watchdog and street cop.

One specific concern, expressed in this Committee's request for testimony, was the possible impact on the validity of criminal prosecutions if evidence obtained by Inspectors General acting outside of their statutory authority was to be used at trial. We could not discount the possibility that a defendant would attempt to set aside a conviction or block a prosecution because it was based on an investigation that was beyond an Inspector General's authority. We see no useful reason to highlight the specific arguments that might be raised to attack the validity of a prosecution. In sum, however, we believe the Government has a strong position that would protect convictions and prosecutions based on evidence obtained during such investigations that were beyond the scope of Inspector General authority. Even so, prosecutions frequently present significant hurdles in proving to the jury both that the defendant was engaged in unlawful conduct and that such conduct was performed with the requisite criminal intent. These prosecutions should not be burdened by unnecessary extra questions about the Inspector General's authority to participate in the investigation.

For your information, we are aware of only three challenges to convictions or prosecutions that were brought in the year since the OLC Opinion was issued. None of those was successful.

We are not able specifically to divide the prior convictions obtained in part through IG investigatory work, and state in what number an IG might have been operating inconsistently with that office's authority. In many respects, only each individual Inspector General Office would have the information in sufficient detail to indicate the subject matter of each investigation. Still, we agree with the Committee that quantifying the issue is relevant. The following should be helpful in that regard.

We will discuss two Inspector General offices to explain our analysis of their work. The first, and the one that has been much discussed in relation to the authority issue, is the IG for the Department of Health and Human Services. In a report submitted to this Committee in March, 1990, entitled "Summary of OIG Involvement in Food and Drug Administration Criminal Investigations," Inspector General Richard P. Kusserow has stated that investigations conducted by his office during FY 1990 have led to 1278 convictions against individuals and entities who committed offenses involving HHS programs. During that same time period, 30 arrests or convictions were obtained pursuant to the delegation of investigatory authority for Food and Drug Administration matters. There were also 8 employee disciplinary actions or referrals involving FDA, though it would appear the delegation was not a necessary predicate for those. Thus, only approximately 3% of the convictions obtained through HHS-IG investigatory endeavors were dependent upon the purported delegation of authority.

Indeed, after HHS Secretary Sullivan withdrew the delegation, a total of 212 investigations in which IG involvement at some level occurred were identified by the IG as being subject to the authority question. It appears to us that this includes the 30 for which convictions were obtained. Our examination of a printout we received from the IG in February revealed that in perhaps 50 or more matters the OIG had jurisdiction without regard to the Secretary's withdrawal of the delegation. Moreover, approximately 30 additional matters were closed by OIG, generally because the OIG determined that the allegations were unsubstantiated or a United States Attorney declined prosecution, without any regard to questions about the OIG's authority. Thus, at most only approximately 130 matters were left for possible referral to the Food and Drug Administration for whatever further development was required. As of April 20, 1990, the Inspector General has referred 90 files to the Department of Justice. The

Food and Drug Administration already had been investigating many of these. Many of the remainder were minor allegations received by the Inspector General that had apparently not yet been investigated, and did not include evidence of serious criminal wrongdoing.

Though we do not find in the Inspector General's March, 1990 report to this Committee the total number of cases handled by the HHS-IG during a one-year period, we did discover that in the 1990 appropriation hearing for his office, Mr. Kusserow testified the HHS-IG had an average of 3755 investigations underway. If that means that on any given day during the year that was the average, then the total number of cases with which the IG was involved for the year would in addition include other cases opened or closed. Such a computation might dramatically alter the total. Yet even just using the 3755 figure, and even employing the full number of 212 "affected" cases, which clearly is at least twice too large, less than 6% of what the IG investigated are questioned FDA matters.

It is also instructive that the HHS Inspector General's own statement to me in a meeting in February, 1990, was that the FDA matters were an "insignificant" part of his office's total investigation inventory. After viewing these figures, that assertion rings true. Thus, as to the work of this particular Office of Inspector General, the number of past investigations affected by the authority question is minimal.

A separate set of figures puts the questions raised about the impact of the OLC opinion in perspective. For the large number of IG offices that have not taken a role in regulatory matters, this clarification of authority is virtually irrelevant. For example, we examined information from the Department of Defense Office of Inspector General. Their latest semi-annual report reveals that for the six month period from April 1 through September 30, 1989, that office conducted 4811 investigations. Our review of the twelve categories used by the Defense Department IG to describe its investigations, indicates none of those investigations would be affected by the authority issues.

This Committee itself may have reports from individual Inspectors General that indicate their perception of the breadth of the impact of the authority issue. Our very clear perception is that although from a few offices there are statements that a large segment of initiatives have been impeded, the overwhelming majority of investigations government-wide are unaffected by this clarification of jurisdiction. In part that is because most IG's have only conducted investigations that fall within the traditional understanding of Inspector General authority. Since a group of Inspectors General will also be testifying before this Committee, their individual view of the scope of the authority issue will be presented as well.

The Committee has asked (Question E) for assurances that fully appropriate attention will be given to subsequent investigations. Let me assure this body that we are committed to investigating criminal conduct and believe the answers for the future are not that complicated. For example, we have previously submitted written guidance to the HHS-IG regarding that Office's authority. We present that to the Committee here today.

This guidance indicates that there is an incredibly broad range of IG responsibilities that are totally consistent with the proper statutory authority of that office. The most significant is the traditional fraud, waste and abuse within the agency. If this kind of violation is coupled with allegations of substantive violations of the statutes regulated by the agency, the IG's involvement in the intertwined aspects of the case is generally appropriate. The component of the Department of Justice that traditionally deals with that particular agency and its IG stands ready to provide advice as to specific questions.

As part of the analysis of the tools available for future investigations, we should mention the additional advice that we have given the HHS-IG. There are obvious resource allocation problems within almost every agency. If a particular agency with responsibility over an investigation needs assistance from its IG, and the IG's authority would not encompass the assistance needed, we believe a detail of the necessary IG investigators to the appropriate agency in most cases would statutorily be permitted. The relevant agency or Executive branch department's specific statutes, including its appropriations, need to be examined before a specific answer can be given. The advantage of a detail is that it is consistent with the concept of having a separate IG office of watchdogs. Once detailed to the regulatory agency, the IG personnel become supervised by that agency, not the IG's office, and they become part of the overall regulatory mission. For purposes of that specific investigation, they are as much part of the regulatory agency as any other employee, and also as subject to the IG office's traditional oversight for misconduct, fraud, waste and abuse.

The Federal Bureau of Investigation also has a role. We in no way belittle the substantial responsibilities the FBI has in countless other areas. But specific assurances have been given that make us comfortable in stating that the FBI will handle significant criminal investigations for which no other resource is available.

The whole question of which is the proper office to handle an investigation has also raised concerns about liability if improper actions were taken. Specifically, Senator Glenn's letter asked about possible _Bivens_ constitutional tort actions against Inspector General agents who participate in unauthorized investigations. We do not believe that any constitutional rights are implicated by the question of whether a particular investigation is authorized by the Inspectors General's Act. Thus, that question should have no bearing upon an investigator's exposure to _Bivens_ liability. A court should not perceive an IG's potential actions outside the scope of his statutory authority as a violation of a constitutional right that would lead to _Bivens_ litigation. Any investigation, clearly within or clearly outside an IG's authority, has the technical potential for Bivens exposure, but only if the actions violated the plaintiff's clearly established constitutional rights of which the government employee should have known. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). Thus, the employee's liability is determined by an examination of the nature of the acts in question, rather than whether the acts were authorized.

Of course, a Bivens constitutional tort is not the only possible liability that a government employee might have. As to common law torts, there is potential protection from liability by operation of 28 U.S.C. § 2679. That statute provides that, upon the certification by the Attorney General that the employee was acting within the scope of his employment with regard to the acts in question, the United States shall be substituted as defendant in any common law tort action against a government employee.

The determination of whether to authorize representation when an employee is sued in his individual capacity is determined upon a case by case basis after a thorough analysis of the facts of each case. The determination is governed by a two part test: (1) was the employee acting within the scope of his employment, and (2) is representation otherwise in the interest of the United States. 28 C.F.R. § 50.15.

In general, resolution of the first question depends upon the purpose of the employee's actions. If the employee is acting to further the interests of the government, rather than some personal interest or motive, his actions, even if mistaken or misguided, will be viewed as being within the scope of employment. This is particularly true if the actions were taken at the instruction of the employee's supervisor.

The determination of whether representation is in the interest of the United States is also dependent upon an analysis of the facts and circumstances of the individual case. Obviously, it is not in the government's interest to represent an individual if the known facts indicate that he has engaged in serious improprieties or criminal conduct. By contrast, it is in the government's interest to minimize the disruption caused by individual liability lawsuits that result from an employee's good faith attempt to perform his duties.

Because of uncertainties some Inspectors General have had regarding their authority, a certification could still be proper that employees who conducted questioned investigations pursuant to instructions from their supervisors were acting within the scope of their employment.

You have requested some additional history on the steps the Department of Justice took regarding the withdrawal of a delegation of investigatory authority from the Secretary of Health and Human Services to that Department's IG. You specifically ask "why DOJ felt it was necessary to insert itself?" It has been alleged by some that this was nothing more than a "turf battle." Such an allegation is the almost instantaneous explanation for some when an issue of authority is raised. Such a view is both unfortunate and unfair. In summary, the Department "inserted itself" because prosecutions might have been adversely affected, and IG participation in certain substantive FDA matters would have been a violation of the letter and purpose of the Inspector General Act. If the Department of Justice cannot pursue concerns such as these without its motives being questioned, then that fact is indeed portentous.

CONCLUSION

We have presented here today our objective view on the impact the IG authority issue will have on work already performed by those 24 offices, and the ability of each IG to perform necessary investigations in the future. We believe that the past investigations and convictions cannot be successfully questioned in court action, but continuing and magnifying the risk of that was inexcusable. We firmly believe that a proper understanding of the expansive IG authority leads inescapably to the conclusion that most future investigations should continue unimpeded. Those areas in which questions arise can be dealt with through the mechanisms that we have suggested. There is no reason for past, present or future malefactors to feel comfort over the issues that have been raised regarding IG authority. Vigorous investigatory efforts are unhampered and in only a small minority of cases diverted to other resources. Prosecutions and convictions are now even less subject to needless technical attacks, and the letter and the purpose of the Inspector General Act is being fulfilled.

Yes, problems will remain in the investigation, prosecution and conviction of criminal conduct. These problems are no worse, however, and we in all candor believe they are actually lessened, by proper understanding of and respect for the appropriate role of the Inspectors General in the Executive Branch.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

March 28, 1990

Richard P. Kusserow
Inspector General
Office of the Inspector General
Department of Health & Human Services
Washington, D.C. 20201

Dear Mr. Kusserow:

Over the past six weeks, members of our respective staffs have engaged in a number of what I hope have been productive discussions concerning the scope of Inspector General jurisdiction and permissible activity as to Food and Drug Administration cases (as well as generally) in view of the opinion on the subject issued by the Office of Legal Counsel. In the wake of those exchanges between our offices, I thought it useful to confirm in writing what the metes and bounds of that considerable jurisdiction are.

As you can see from the attached summary, your office has a broad range of authority regarding the FDA. As cases arise, IG jurisdiction most often will be determinable from the face of the subject matter of the allegation raised. In cases of doubt, the Department of Justice and the Office of the Inspector General shall meet promptly to discuss the matter. Where it is determined that, under the Office of Legal Counsel opinion, the Inspector General does not have independent jurisdiction, the Civil Division will consider alternative means for Inspector General involvement on a case by case basis.

The legal issues that undergird jurisdictional limitations are matters of importance which can be adhered to without prejudice to the effective development of food and drug cases. We thus look forward to continuing to work with you as our respective offices assure that violations of the food and drug laws are vigorously investigated and that culpable individuals are brought to justice.

Sincerely,

Stuart M. Gerson

Stuart M. Gerson
Assistant Attorney General

cc: Michael J. Astrue
General Counsel
Department of Health and Human Services

General Guidance Regarding HHS Office of Inspector General Investigations or Referrals of FDA Related Matters

The following describes the appropriate handling by the Department of Health and Human Services' Office of Inspector General (OIG) of allegations and cases relating to the Food and Drug Administration.

1. The OIG has full authority to investigate matters focusing on mismanagement within FDA, employee misconduct matters, and fraud, waste and abuse by recipients of FDA funds. Such matters are within the OIG's investigative jurisdiction, and need not be referred to the Justice Department until such time as the investigation is completed.

2. Upon completion of the OIG investigation, the matters referred to in paragraph 1 above are to be referred to the Criminal Division of the Department of Justice or to an appropriate United States Attorney's office for prosecution, with immediate notice of such referral being given to the Office of Consumer Litigation of the Civil Division.

3. As to matters relating to the Food and Drug Administration (other than matters set forth in paragraph 1 above) which solely involve violations of the Federal Food, Drug, and Cosmetic Act ("FFDCA") (including the Prescription Drug Marketing Act), or related statutes [for instance 18 U.S.C. § 1001 (false statements); 18 U.S.C. § 371 (conspiracy); 18 U.S.C. §§ 1341, 1343 (mail and wire fraud)], the OIG may not investigate unless arrangements are made for OIG involvement consistent with the Office of Legal Counsel (OLC) opinion of March 9, 1989. Such arrangements could include a temporary detail to other appropriate agencies. Examples covered by this paragraph include: steroids cases; distribution of counterfeit drugs; illegal distribution of drug samples; illegal diversion of drugs; failures by regulated entities to report information or false statements in the approval, post-approval or inspection process; and the unapproved use, marketing, misbranding or adulterating of products regulated by FDA.

4. If the OIG desires involvement in any of the allegations, matters and cases falling within the categories described in paragraph 3 above, it may request that the Department of Justice determine whether the OIG may do so consistently with the OLC opinion. The request should be directed to the Office of Consumer Litigation.

5. As to any investigation that will involve matters within paragraph 1 above and also associated violations of the

FFDCA or related statutes by regulated industry, the OIG's continued participation is generally appropriate. Thus, if there are alleged violations both within and without the proper jurisdiction of the OIG, both may be pursued if there is a sufficient nexus between them. The Office of Consumer Litigation will, upon referral of such an investigation, certify the propriety of OIG's participation. This may require input from the relevant United States Attorney's office.

6. If OIG has any question as to whether a particular FDA related allegation or matter falls within its investigative jurisdiction, it should discuss it with the Office of Consumer Litigation.

7. Referral of new matters received by the OIG should be in accordance with the responsibilities and referral procedures within HHS in place prior to July 24, 1989. Matters normally investigated by FDA prior to referral (assuming they do not suggest improper action by FDA personnel) should be investigated by FDA unless it is concluded that a particular matter should receive Office of Consumer Litigation attention in the first instance.

Authority of HHS Inspector General to Investigate Private Party Fraud Against FDA

The HHS Office of Inspector General may investigate fraud by those who contract with, or receive grants from, the FDA. In connection with an oversight investigation of a regulatory program, the office may perform "spot checks" of the FDA's own investigations by looking into some of the specific cases of alleged fraud that the agency is or could be pursuing. Furthermore, the office has authority to investigate private parties' collusion in, or inducement of, wrongdoing by FDA personnel. However, as explained below, it is our view that the Inspector General Act of 1978 ("Act") does not authorize the Inspector General to undertake investigations that are an integral part of the FDA's programs. We believe that certain investigations of fraud against the FDA would fall into this category.

The Act makes it the "duty and responsibility of each Inspector General, with respect to the establishment within which his Office is established . . . to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment" and "to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of . . . preventing and detecting fraud and abuse in . . . its programs and operations." 5 U.S.C. App. § 4(a)(1) & (3). There have been disputes over the scope of Inspector General (IG) authority to conduct investigations. As noted above, the Office of Legal Counsel in the Department of Justice issued an opinion on March 9, 1989, which dealt with the scope of an IG's authority in the context of regulatory investigations. The Opinion concluded that the Act does not generally vest in the IG of the Department of Labor the authority to conduct investigations into alleged violations of the regulatory statutes administered by that agency. Underlying the Opinion was a distinction between, on the one hand, the oversight role that IGs properly perform by investigating the manner in which agencies discharge their responsibilities and, on the other hand, "a direct role in investigations conducted pursuant to regulatory statutes" (Opinion at 1), which IGs may not undertake.

The Opinion pointed to legislative history that supported this distinction. Congressman Levitas, for example, stated

> The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibilities to divide allegiances. The Inspectors General will be responsible for audits and investigations

> only . . . . Moreover, the offices of Inspector General would not be a new 'layer of bureaucracy' to plague the public. They would deal exclusively with the internal operations of the departments and agencies. Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.

124 Cong. Rec. 10,405 (1978).

In particular, the legislative history compels the conclusion that IGs do not have authority to conduct investigations that are an "integral part" of the agency's programs:

> While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and the prevention and detection of fraud and abuse in such programs, they would not have such responsibility for audits and investigations constituting an integral part of the programs involved. Examples of this would be audits conducted by USDA's Packers and Stockyards Administration in the course of its regulation of livestock marketing and investigations conducted by the Department of Labor as a means of enforcing the Fair Labor Standards Act. In such cases, the Inspector General would have oversight rather than direct responsibility.

H. R. Rep. No. 584, 95th Cong., 1st Sess. 12-13 (1977) (emphasis added).[1] Thus, where an agency's compliance and enforcement unit has authority to detect and investigate non-compliance by a regulated party that could also be characterized as fraud against the agency, the IG may not supplant the work of that compliance and enforcement unit. If the agency unit is not performing its responsibilities effectively, the IG has full authority to report on the shortcomings and recommend improvements. But the Act, as the legislative history makes plain, does not enable the IG to undertake himself the investigative tasks that Congress has made an integral part of the agency's programs.

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[1] In addition, section 9(a)(2) of the Act forbids delegating to IGs any "program operating responsibilities."

As the Department's Office of Legal Counsel observed in its Opinion, a division of authority based on whether investigations are an integral part of an agency's programs is not only mandated by law but essential to protect the independence of IGs. The officials designated by law to make and carry out policy for an agency are to direct the investigations that are required for the discharge of their responsibilities. The IGs, who oversee the efficiency and integrity with which these policies are carried out, retain their independence because they do not themselves become responsible for the implementation of the agency's policies. Thus, the IG may investigate the agency's conduct of regulatory investigations but may not conduct such investigations himself.

The division of responsibility set up by the Act leaves wide and appropriate scope for investigations by IGs. IGs may investigate the recipients of federal funds, such as contractors and grantees, see, e.g., S. Rep. No. 1071, 95th Cong., 2d Sess. 4, 6, 27 (1978). A special concern with financial wrongdoing led Congress to give IGs' this power, and the power is recognized in the legislative history of the Act: "The [Inspector General's] focus is the way in which Federal tax dollars are spent by the agency, both in its internal operations and its federally-funded programs." S. Rep. No. 1071 at 27. See id. at 4 (concern was with "fraud, abuse and waste in the operations of Federal departments and agencies and in federally-funded programs"); id. at 6 (noting the need "to insure that Federal funds are spent carefully and in accordance with law"). IGs may also investigate the actions of agencies and their employees, see, e.g., id. at 4, 28, and this authority also permits the IGs to investigate private persons alleged to have colluded with agency employees in wrongdoing. Furthermore, in the course of an oversight investigation of a regulatory program, an IG may make "spot checks" of the effectiveness of the agency's activities, by looking into the facts of particular instances where a regulated person has allegedly defrauded the agency.

These general principles apply to the relation between the investigatory authority of the FDA and that of the HHS Office of Inspector General (OIG). It seems clear that the FDA, as a central part of its regulation of the food and drug industries, is responsible for investigating fraud allegedly committed against the agency by persons that the agency regulates. For example, as to drugs, the FFDCA expressly assigns that responsibility to the agency, providing that the "Secretary [of Health and Human Services] shall, after due notice and opportunity for hearing to the applicant, withdraw approval of an application with respect to any drug under this section if the

Secretary finds . . . that the application contains any untrue statement of a material fact." 21 U.S.C. § 355(e)(5); see 21 C.F.R. § 5.10(a)(1) (delegating functions under FFDCA to Commissioner of FDA). Furthermore, the FDA is responsible, more generally, for enforcing laws applicable to drug manufacturers and other licensees of the agency. See, e.g., 21 U.S.C. § 360; see also 21 U.S.C. § 335 (FDA hearing before reporting criminal violation of FFDCA to the Justice Department). Therefore, should fraud result in violations of those laws, the FDA's jurisdiction would cover investigations, including investigations of possible criminal offenses. The FDA maintains a staff of investigators and compliance personnel, whose duties include determining whether persons regulated by the agency have committed such fraud in connection with the agency's regulation. See 21 U.S.C. § 372(a). Investigations of fraud against the FDA, therefore, will as a general matter be an integral part of the FDA's programs and thus outside the OIG's jurisdiction. Of course, we are not addressing here any specific matter involving the FDA, and the facts in particular cases might affect whether an investigation was "an integral part of the programs involved."

Although we believe that it is not proper to turn over to the OIG the responsibility for regulatory investigations that are an integral part of FDA's programs, it may be appropriate to detail OIG personnel to FDA's enforcement and compliance unit in order to assist in such investigations. OIG personnel, for example, may offer expertise not otherwise available to the agency. Through such details, FDA can have the benefit of the special expertise of OIG personnel and yet maintain control over the discharge of its statutory responsibilities. Moreover, this approach permits the OIG to maintain its necessary independence from program responsibilities.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAY 4 1990

THE INSPECTOR GENERAL

Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This letter is to express our continuing concerns over the limitations that the Justice Department has sought to impose on Inspector General activities by the Kmiec Memorandum.

The memorandum fails to distinguish investigative responsibilities. Some investigations may appear at the outset to involve criminal violations, but may turn out to involve viable civil and/or administrative issues only; yet, the FBI handles criminal matters alone. Our experience shows that once the FBI completes the criminal aspects of a case, their interest in the matter is concluded. The Inspector General, on the other hand, has mandated responsibility to pursue the civil and administrative issues of an investigation, even after criminal issues have been dropped. The FBI bears no mandate for using its findings to assist agency officials in improving and strengthening the programs involved but the IG does.

Another problem with the Kmiec memorandum is that it does not address the necessity for the Inspector General to exercise his mandated authority to conduct oversight investigations involving agency programs. Such investigations are a temporary, finite process and have never become either permanent or integral to the Agency's operations. The EPA OIG has performed investigations concerning regulatory areas such as asbestos removal[1] and the Gray Market vehicle program,[2] in which EPA was not doing its job. These efforts were successful in identifying the existing problems, and in deterring future criminal activity in these programs.

Should you or your staff have additional questions regarding this letter, please contact Assistant Inspector General for Investigations John E. Barden at 382-4109.

Sincerely,

John C. Martin

John C. Martin

Endnotes

1. One example of our oversight of a regulatory program resulted recently in the conviction of an asbestos removal contractor and four of his employees in a case in which no federal funds were involved. The company president and four employees were convicted of charges arising from their use of workers who were neither trained or certified by an EPA-approved training program to remove asbestos, as contracted, from public school buildings in two Connecticut communities. The consequence of not adhering to EPA asbestos removal training regulations may have resulted in imperiling the health of the asbestos removal workers and the occupants of these public schools. The firm's president pleaded guilty to making false statements to a Government agency; the employees were charged with violating the Toxic Substances Control Act. This was a regulatory program area in which the Agency was not active.

2. At EPA, a massive fraud was being perpetrated on the Agency in a way that did not involve Federal funds or employees. Our investigations involving imported nonconforming automobiles are an excellent example of the exercise of programmatic oversight authority. In 1985, we had reason to believe that many of the certifications to EPA (that these automobiles had been modified to conform to EPA emission standards) were false. EPA's apparent failure to effectively insure that these modifications were in fact made was damaging public confidence in EPA's ability to manage this program.

At the time the number of nonconforming "gray market" vehicles imported into the United States rose sharply, from fewer than 2,000 such cases in 1980, to about 68,000 in 1985, the year in which my office began investigative efforts in the Gray Market area. From 1985 to 1988, the number of such cars imported into the U.S. dropped from about 68,000 in 1985 to about 5,700 in 1988, and about 1,500 during the first 6 months of 1989.

During 1985, the EPA Office of Inspector General, under its oversight authority to monitor the effectiveness of Agency programs, initiated a limited number of investigations concerning entities involved in the Gray Market industry. In particular, we scrutinized certain modification shops, testing facilities, and importers handling Gray Market vehicles. In doing so we worked with responsible state agencies, such as the California Air Resources Board and with other Federal agencies, including the FBI and the U.S. Customs Service and the OIG of the U.S. Department of Transportation. The result of this coordinated effort has produced 73 indictments of individuals and entities involved in the Gray Market business.

In February 1987, "Auto Week" magazine in an article entitled "Dark Days for Gray Market" credits these indictments as a major factor forcing many importers out of the Gray Market business. Another beneficial change that resulted from our success is that the State of California which previously received about 65% of the nonconforming vehicles imported into the United States introduced strict new rules in 1988 which excluded many such vehicles. The manufacturers of these vehicles are now importing them as conforming models and through regular channels.

BEFORE THE
COMMITTEE ON GOVERNMENT ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

TESTIMONY OF THE INSPECTOR GENERAL OF THE RAILROAD RETIREMENT BOARD

APRIL 25, 1990

Mr. Chairman and Members of the Committee:

My name is William J. Doyle III, Inspector General of the Railroad Retirement Board (RRB). I would like to submit this testimony concerning the Kmiec memorandum for the record.

Let me thank you, Mr. Chairman, and the other members of your committee, for your strong support of all Inspectors General government wide.

I feel it is important that you have some background on the Railroad Retirement Board and the accomplishments of the Office of Inspector General (OIG). Therefore, I would like to begin by providing you with some history of both the Railroad Retirement Board and the Office of Inspector General.

The Railroad Retirement Board was created in the 1930's by legislation establishing a retirement benefit program for the nation's railroad workers. The Railroad Retirement Board is an independent agency in the executive branch of the Federal Government. The primary function is to administer comprehensive retirement-survivor and unemployment-sickness benefit programs for the nation's railroad workers and their families, under the Railroad Retirement and Railroad Unemployment Insurance Acts.

During fiscal year 1989, retirement and unemployment insurance benefit payments to over 1 million beneficiaries totaled more than $7 billion. Retirement-survivor benefits of $6.9 billion were paid to over 900,000 annuitants. Unemployment-sickness benefits of $89 million were paid to over 60,000 beneficiaries.

The Office of Inspector General was established in January 1986 to provide audit and investigative oversight of the Railroad Retirement Board and the Programs which provide Federal insurance protection for America's railroad workers and their families. Since the OIG's inception, it has been our goal to eliminate fraud, ensure that benefits are paid accurately and timely to beneficiaries, and finally, to safeguard the trust funds from which all benefits are paid.

Since FY 1988, our audit and investigative efforts have resulted in $606 million in recoveries and potential monetary benefits together with 167 criminal convictions. We have made major contributions toward improving the economy and efficiency of RRB operations and increasing fraud awareness.

Our major audit emphasis continues to be in those high risk areas that will significantly impact the RRB operations and its annuitants. We continue to monitor trust fund adjustments and investment practices of the RRB. We plan to expand our audit coverage of railroad employers -- an area with substantial monetary impact.

Since 1988, we have been performing payroll audits of railroad employers. Taxes imposed by the Railroad Retirement Tax Act on employers and employees remain the primary source of income for paying railroad retirement and survivor benefits. As a result, our audit plan includes continuing reviews of the nation's largest railroads. To date, we have reported on widespread non-compliance of payroll taxes. For example, recent reviews have identified over $10 million in taxes not paid by certain railroads. In one current employer audit, we identified an issue which showed in excess of $1.4 million of additional taxes due. We are also concerned about this employer's parent company which follows the same accounting procedures. We estimate the additional liability for the parent to be in excess of $5 million on this issue alone. This aggregate $6.4 million figure does not include civil penalties and interest that could be assessed pursuant to IRS regulations, thereby substantially increasing the monetary impact of our audits. Our research in this area indicates that this is a major area of non-compliance by the nation's railroad employers.

The Kmiec ruling in March, 1989 by the Justice Department's Office of Legal Counsel (OLC) basically stated that the Labor Department's Inspector General lacked authority to investigate private individuals or groups that do not receive federal funds. I am very concerned about this decision. We have been informed that certain rail employers are beginning to question and challenge our authority to conduct payroll audits. We believe it is their intention to use the theory upon which the Kmiec ruling is based to block our audit efforts. We do not recognize this theory as affecting our railroad audits. However, we fear that broad based interpretations of the OLC decision could affect future OIG initiatives in this office as well as other Offices of Inspectors General. We are deeply concerned that one or a group of employers (including railroad employers) might find a way to circumvent Inspector General compliance audits across the government in general. We feel very strongly that the Inspectors General are authorized to conduct audits and investigations involving external parties and are not limited to situations involving monetary benefits provided by the Agency.

In conclusion, I believe that the Inspectors General have proven to be effective in carrying out their Congressional mandate to eliminate fraud, waste and abuse from Government Programs. Any attempt to limit the authority of the Inspectors General will be detrimental to their mission.

Mr. Chairman, this concludes my remarks and I appreciate the opportunity to make this presentation to you and Members of the Committee.

United States Information Agency

Washington, D.C. 20547

INSPECTOR GENERAL

APR 23 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
U. S. Senate

Dear Mr. Chairman:

As requested by Mr. James Carroll of your committee staff this letter provides further details of how the Office of Legal Counsel "Kmiec I" opinion has impacted on our ability to conduct investigations as they relate to the United States Information Agency (USIA) J-1 Visa Program.

The Mutual Educational and Cultural Exchange Act of 1961 was enacted to promote foreign policy objectives of mutual understanding between the people of the United States and other countries through educational and cultural activities. To serve its purposes, the act established the J visa to enable nonimmigrant aliens to enter the United States to participate in educational and cultural exchange programs. Educational institutions and organizations must be designated as an Exchange Visitor Sponsor by the Agency before inviting participants to come as exchange visitors on the J-1 visa.

The Office of Inspector General (OIG) has been informed by the Agency's Office of General Counsel (GC) of alleged abuses under the program including work programs being conducted under the guise of training, various abuses of program participants, and other program violations. GC, which is responsible for the program, does not have the resources to investigate such alleged abuses. Further, GC believes that, because program sponsors have neither federal employees nor direct federal funding, OIG is precluded under the OLC opinion from conducting such investigations. OIG and GC have been exploring other approaches to investigating the abuses including detailing OIG personnel to the GC. However, this does not represent a satisfactory long-term solution to the problem, and does not provide independent OIG investigative authority. OIG is awaiting further information and guidance from GC. To date, no investigations have been conducted.

If you or your staff have any further questions, please contact me at 485-7931.

Sincerely,

J. Richard Berman
Acting Inspector General

REPORT

TO THE

SENATE GOVERNMENTAL AFFAIRS COMMITTEE

ON

AUTHORITY OF INSPECTORS GENERAL TO CONDUCT CRIMINAL INVESTIGATIONS RELATING TO REGULATORY PROGRAMS

June 11, 1990

JAMES R. NAUGHTON [1]

SUMMARY

I. BACKGROUND

The Inspector General Act of 1978 (the IG Act) provided for Presidentially appointed Inspectors General (IG's) at twelve Federal departments and agencies. The 1978 Act was patterned after 1976 legislation which had created a statutory Office of Inspector General (OIG) at the Department of Health, Education and Welfare. Other legislation brought the total number of statutory inspectors general to 19 by 1988, including offices at all cabinet departments except Justice and Treasury.

Five more Presidentially appointed Inspectors General, including IG's at the Justice and Treasury Departments, were authorized by the 1988 Amendments to the 1978 Act; the 1988 Amentdments also provided for statutory IG's at 33 "designated federal entities". Although appointed by the entity head, IG's at designated entities were given essentially the same powers and duties as those appointed by the President.

The IG legislation was enacted because Congressional investigations in the 1960's and 1970's disclosed serious problems and deficiencies in the organization, procedures and resources of auditing and investigative units in Federal agencies, including:

-audit and investigative units scattered throughout agencies in haphazard fashion with no central leadership;

-multiple investigations involving the same circumstances or individuals with no effective coordination or communication among different investigative units

-lack of independence because audit and investigative units were under the direct control of program managers;

-resources so lacking that one department had a 10-year backlog of uninvestigated cases and others had activities which had never been audited.

-criminal cases developed by agency investigators which were being held up by agency officials for months or even years before being sent to the Justice Department for prosecution or never being referred at all.

To combat these problems, the 1978 Act assigned responsibility for audits and investigations and for leadership and coordination of related activities to a single individual in each agency, who would have no program operating responsibilities and would report significant problems, abuses and deficiencies and the progress of corrective action to both the agency head and Congress.

The Act provided the new Inspectors General with broad authority to carry out their responsibilities, including specific provisions designed to insure independence, to prevent interference with audits and investigations and to enable the IG to obtain necessary information.

The 1978 IG Act was initially opposed by the Office of Management and Budget (OMB), all twelve of the departments and agencies affected, and the Justice Department's Office of Legal Counsel (OLC), which contended that some of the Act's provisions were unconstitutional. Nevertheless, the proposed legislation passed the House by a vote of 388 to 6 and was approved by the Senate without opposition.

After enactment of the 1978 law, the IG concept was widely accepted and operations of the IG offices produced impressive accomplishments. OMB estimated in 1988 that IG activities over an eight year period had resulted in savings and cost avoidance of $110 billion and nearly 23,000 successful civil and criminal prosecutions.

The Defense Department's IG office reported that 20 of the 100 largest defense contractors were convicted of procurement fraud during the seven years following establishment of that office; by contrast, not one major defense contractor had been convicted on such charges during the preceding four decades.

In March 1989, in response to a request from the Solicitor of the Department of Labor, the Office of Legal Counsel issued a memorandum (the "Kmiec memorandum") contending that the IG Act does not authorize Inspectors General to investigate criminal violations which involve Federal regulatory programs but do not directly involve Federal personnel or money.

II. OLC MEMORANDUM NOT BASED ON FACTS

OLC initially said it could not give a legal opinion in the absence of a specific fact situation, but later changed its position. The memorandum eventually issued was characterized by OLC as "an opinion establishing general principles" applicable not just to the Labor Department IG, but to all IGs.

Although purportedly applicable to all IG's, the OLC opinion, was evidently based on a small amount of information supplied by the Labor Department Solicitor. The accuracy of the information provided was questioned, but the Kmiec memorandum gives no indication that OLC made an independent review to determine the facts.

III. CONFUSING NATURE OF OLC MEMORANDUM

The OLC memorandum uses clear and easily understandable language to acknowledge that IG's have broad investigative authority.

However, OLC's discussion of alleged limitations on IG investigative authority is exceptionally difficult to decipher because it relies heavily on unusual and confusing phrases for which adequate definitions are not supplied and cannot be found.

Moreover, key words with very clear -- and very different meanings -- are used interchangeably.

The confusing nature of the Kmiec memorandum is clearly illustrated by the summary conclusion on its last page. After 18 pages of discussion, OLC concludes that the IG Act does not authorize Inspectors General to take over regulatory program operations, a proposition which -- so far as is known -- no Inspector General has ever disputed.

IV. OLC MISUNDERSTANDING OR IGNORANCE OF FACTS

OLC's perception of the basic mission of Inspectors General is not only totally inaccurate -- it is bizarre. OLC evidently believes that the IG's role is to see that the Executive Branch's "traditional" criminal investigators do their work and "are not themselves violating the law".

The problem with OLC's view is that almost all the criminal investigators outside the Treasury and Justice Departments are in IG offices. Consequently, if IG investigators were acting in accordance with OLC's view of their role, there would be a dozen or more IG investigators to police the activities of each non-IG criminal investigator in their agencies and almost no one to investigate criminal violations.

It is evident from the Kmiec memorandum that OLC does not understand the complex organizational structure and distribution of responsibilities in Federal agencies. Instead, OLC apparently believes that agency units and personnel are divided neatly into single-function categories, with no overlapping or concurrent responsibilities.

The Kmiec memorandum does not discuss any regulatory program in depth and identifies only a handful of such programs. However, OLC purports to enunciate "general principles" applicable to all Federal regulatory programs, thereby presuming to pass judgment on an extraordinarily large number of programs with widely differing objectives and very different enforcement, examination or inspection procedures. OLC took this action, moreover, without ever ascertaining how many Federal regulatory programs there are, let alone what they are all about.

V. MISINTERPRETATION OF STATUTORY AUTHORITY

The OLC memorandum cites provisions of the IG Act authorizing the Inspectors General to conduct audits, investigations and other activities relating to agency programs and operations. However, it does not mention at least seven other provisions granting specific additional authority for or prohibiting interference with investigative activities.

The Act refers to investigations "relating to" agency programs and operations rather than investigations "of" such activities. The phrase "relating to", meaning "having some connection or relationship with" was deliberately chosen to describe the broad jurisdiction Congress intended IG's to have. However, the OLC memorandum has interpreted the statutory language as though the word "of" had been used".

Significantly, the Act contains no language whatever which prohibits an IG from investigating criminal violations involving regulatory programs, nor is there any language which permits agency officials to interfere with such investigations. (Since agency heads at DOD, Treasury and Justice are authorized to interfere with investigations of their own agency's IG under certain carefully specified conditions, the absence of similar provisions for other agencies clearly shows that Congress intended no such limitations on the authority of IG's at other agencies.)

VI. OLC MISINTERPRETATION OR IGNORANCE OF LEGISLATIVE HISTORY

Since the language of the IG Act does not support OLC's contention that Inspectors General lack authority to investigate criminal violations involving regulatory programs, it is hardly surprizing OLC has ignored the plain language of the Act and attempted to make its case by relying on what it claims is the "legislative history" of the Act.

Whether by design or because of lack of knowledge, the Kmiec memorandum has failed to mention extremely important aspects of the Act's legislative history, while ascribing great importance to ambiguous language quoted out of context.

VII. IG'S NOT LIMITED TO INTERNAL INVESTIGATIONS

The OLC memorandum has presented a picture of the "legislative history" of the IG Act which is incomplete, inaccurate and, in some respects, incredible. Examples of the erroneous nature of the "legislative history according to Kmiec" are provided below.

OLC's bizarre contention that Congress intended IG's to be "police of the police" is discussed in Section IV.

The Kmiec memorandum notes that the 1978 Act did not expressly authorize "regulatory investigations". Congress could hardly be expected to say anything about "regulatory investigations" in 1978, it should be noted, when OLC did not discover them until 1989.

Even if OLC's discovery could have been predicted, there would have been no reason for Congress to address the subject because Inspectors General do not conduct investigations pursuant to (i. e. under the authority of) regulatory statutes; they conduct investigations under the authority of the IG Act.

In support of its contention that Congress regarded Inspectors General as "internal investigators" limited to monitoring the actions of Federal employees and the expenditure of Federal funds, the OLC memorandum cited language from the Senate Report on the IG bill stating that the IG's "focus" is "the way in which Federal tax dollars are spent by the agency, both in its internal operations and its federally-funded programs".

"Focus" means "a center of interest or activity", and the Senate Committee undoubtedly expected IG's to concentrate a major portion of their efforts on the tremendous expenditures being made by Federal agencies. However, there is nothing in the quoted language to suggest that the Senate committee wanted to prohibit IG's from conducting investigations which did not necessarily directly involve tax dollars -- such as, for example, matters involving employee corruption or regulatory programs.

Moreover, the OLC memorandum failed to mention the the immediately preceding sentence of the report, which states that "the committee intends that the [IG] will assume a leadership role in any and all activities which he deems useful", as well as a comment elsewhere in the report that an Inspector General "is basically a law enforcement official".

The IG Act does not contain a definition of "investigation", nor does it need one since the term is in common use and its meaning -- "to examine systematically" or "to observe or inquire into in detail" -- is well understood.

However, the version of the IG bill to which the 1978 Senate report was addressed contained a broad definition of "investigation" added to the House bill by the Senate Committee; the Senate language defined the term to include inquiries into almost any conceivable criminal activity "on the part of any employee, person or firm directly or indirectly connected" with a Federal agency or operations financed by a Federal agency.

There is no evidence that the Senate definition was intended to prevent IG's from investigating criminal violations not directly involving Federal employees or expenditures; if that had been intended, the phrase "or indirectly connected" would not have been used.

However, House sponsors objected because of concern that any definition -- no matter how broad -- might open the door to frivolous court actions challenging the authority of IG's as outside the scope of activities covered by the definition. Consequently, the committee definition was removed from the bill by the Senate.

In January 1984, OLC issued a memorandum contending that, although the State Department Inspector General had authority to investigate passport and visa fraud involving malfeasance on the part of State Department employees, he did not have authority to investigate such fraud on the part of persons who were not employees. OLC cited the deleted definition to support its position, arguing that its use was still appropriate because the deletion "was effected solely to remove surplus language."

OLC's arguments reflect a remarkable degree of ingenuity and boldness. On one hand, OLC points to the Senate definition as evidence that Congress intended to limit the investigative authority of IG's -- even though the definition is not in the Act. On the other hand, OLC contends that deletion of the definition -- which necessarily reinstated the virtually unlimited common meaning of "investigation" -- was "solely to remove surplus language".

For want of a better designation, OLC's legal gymnastics perhaps should be referred to as the "have your cake and eat it too" theory of statutory interpretation.

VIII. CONCURRENT JURISDICTION OVER CRIMINAL VIOLATIONS

Before issuance of the Kmiec memorandum, the Labor Department Inspector General argued that DOL compliance personnel had no authority to investigate violations of Title 18 (the general criminal statute) involving regulatory programs; if the IG also lacked such authority, there would be no entity investigating such violations.

This possibility apparently did not concern OLC, which stated that the Federal Bureau of Investigation "has general criminal investigative authority over all violations of federal law," and suggested that the FBI might have exclusive criminal investigative authority over violations involving regulatory programs.

To the contrary, Inspectors General and the FBI have concurrent jurisdiction for criminal violations involving agency programs and operations, a circumstance which is reflected in memoranda of understanding between IG's and the FBI and in hundreds of joint investigations in which IG and FBI investigators are working together.

OLC dismissed, as not supported by the evidence, the Labor Department IG's claim that Congress was aware that non-statutory IG's were conducting criminal investigations of regulatory programs when it approved the IG Act. However, if OLC had consulted prosecutors it would have learned the IG was right. For example, during 1975 hearings on criminal violations by grain inspectors (who were not Federal employees and did not receive Federal funds), the Justice Department itself told Congress that the Agriculture Department's non-statutory Office of Inspector General -- rather than the FBI -- had primary authority and responsibility for investigating criminal violations of USDA regulatory statutes.

IX. EFFORT TO STOP INVESTIGATIONS AND PROSECUTIONS

In the Kmiec memorandum, OLC contends that Congress did not intend that Inspectors General have authority to conduct criminal investigations involving regulatory programs because it would take "the power to control the investigatory portion of a department's regulatory policy" away from regulatory program managers.

However, a review of the facts shows that the real issue involved was whether the Labor Department Solicitor could prevent the IG from referring evidence of criminal violations to the Justice Department.

In a December 1988 letter to Kmiec, the Labor Department Solicitor complained that the IG had investigated and referred for prosecution a number of criminal violations involving regulatory programs and evidently planned to continue such activities.

Before establishment of the IG Office, Labor Department investigators were not permitted to refer evidence of criminal conduct to the Justice Department; instead they were required to submit such evidence to the Solicitor's office, which might or might not ever refer it to Justice.

The IG Act contains a provision specifically designed to end such practices by requiring Inspectors General to report suspected violations of Federal criminal law to the Justice Department.

Another section of the Act provides that no agency official "shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation". Despite this provision, the Deputy Secretary of Labor, acting on the Solicitor's advice, asked the DOL Inspector General to stop on-going criminal investigations.

OLC, in effect, disregarded the specific language in the IG Act prohibiting such interference and supported agency officials in their efforts to stop IG investigations and prevent referral of criminal violations to the Justice Department.

X. OBJECTIVITY OF INSPECTORS GENERAL

In its memorandum, OLC argued that one of the Inspector General's functions is to criticize regulatory investigative policy, a function he cannot perform if it is his responsibility to set and implement that policy. There is no basis for OLC's expressed concern. The establishment of policies for regulatory programs is part of program operations and the IG Act specifically prohibits the assignment of program operating responsibilities to Inspectors General.

OLC also argued that if the Inspector General is conducting regulatory investigations, there would be no truly objective person to investigate claims of misbehavior and abuse and serve as a check on mistreatment or abuse of the general public by government employees.

The second argument is particularly confusing. If IG's cannot investigate criminal violations involving regulatory programs because it would leave no one to review their work, the same argument could be used to prohibit all other investigations by IG's. Moreover, while IG's do not have their own IG to monitor their activities, they are subject to oversight by the President, agency heads, Congress and the GAO, and can be prosecuted by the Justice Department if they violate the law.

XI. TRANSFER OF RESPONSIBILITIES TO IG OFFICES

The OLC memorandum makes a blanket declaration that responsibility for investigations not involving program operations may not be transferred to an IG by the agency head because such transfers "would not further the purpose of the IG Act." OLC's pronouncement is clearly erroneous; it also constitutes, in effect, an arrogant attempt to usurp authority granted by the IG Act to agency heads.

The IG Act provision authorizing transfers by the agency head was included in the 1976 Act establishing an Inspector General for the Department of Health, Education and Welfare because HEW reportedly had 63 separate units engaged in activities specifically related to the promotion of economy and efficiency, with a total of 3,642 employees directly engaged in such activities.

Most of the entities involved were program evaluation units, which were responsible for reviewing but not operating HEW programs. HEW also had several different investigative units, not all of which were initially transferred to the new IG Office; the HEW Secretary was given authority to make additional transfers in appropriate cases, and some additional units have been transferred.

Hearings leading to the 1978 IG Act disclosed a situation similar to that at HEW, with many units conducting audits or investigations or having other duties related to economy and efficiency and the prevention and detection of fraud and abuse. Since not all of these units were transferred to IG offices by the Act, agency heads were authorized to make additional transfers of units or responsibilities under appropriate circumstances.

An obvious example of "appropriate circumstances" would be a situation where an agency head believes that an evaluation unit would provide more objective information on program effectiveness if it reported to the Inspector General rather than the program manager.

Agency heads were the logical choice to make make determinations concerning such transfers. If Congress had not chosen to place decision making authority in the hands of agency heads, it most assuredly would not have entrusted it to OLC.

XII. COORDINATION OF AUDIT AND INVESTIGATIVE ACTIVITIES

One of the major factors resulting in enactment of IG legislation was the disclosure of serious and pervasive problems involving lack of leadership, lack of effective organization, and lack of coordination in Federal audit and investigative activities.

A comprehensive Congressional investigation of the activities of Texas swindler Billie Sol Estes was a key factor in the eventual development of the 1978 IG Act. The investigation disclosed that Estes' activities had been subject to "an almost unbelievable number" of inquiries and investigations by Federal agencies during a nine year period ending with his arrest in 1962

It also disclosed that the FBI had been given detailed information about Estes" criminal activities a year before Estes was arrested. Instead of prosecuting Estes, however, the Justice Department closed the case without action on the basis of an FBI report indicating that no evidence of a violation of the Federal Reserve Act had been found.

Moreover, copies of suspicious financial statements submitted by Estes to the Department of Agriculture were sent to the Internal Revenue Service by USDA six months before Estes was arrested. Although differences in figures on Estes' tax returns amd those on his financial statements made it obvious that he had either evaded payment of income taxes or filed false financial statements, IRS officials never warned USDA that it might have a problem.

The subcommittee which investigated Estes' activities concluded that Estes had been able to continue his fraudulent operations over a long period of time because most of the many Federal investigtions of his activities over that period had beend conducted "with an almost total absence of effective coordination or communication between or within the departments, agencies, and subunits involved."

In 1975, the same subcommittee found that HEW units with responsibility for prevention and detection of fraud and abuse were "not organized in a coherent pattern" and that there was "no central unit with the overall authority, responsibility and resources necessary to insure effective action against fraud and abuse."

It also found there were two different investigative units looking into fraud and abuse in the Medicare and Medicaid programs, even though many of the same medical providers were participating in both programs. Moreover, fraud investigators were not even allowed to tell each other which providers they were investigating, even though the same providers might be suspected of fraud under both programs.

The lack of coordination was aggravated by a lack of effective leadership; although prompt corrective action had been promised in 1975, further hearings in 1976 disclosed that HEW regulations still did not permit Medicare and Medicaid investigators to exchange information.

Similar problems in other Federal agencies were disclosed during 1977 hearings on IG legislation.

OLC, in effect, argues that Congress intended to require two separate units in each agency to investigate fraud and abuse involving Federal programs, one for cases directly involving Federal funds and another for cases which do not. There is not a shred of evidence in the legislative history to support this contention.

In approving the IG Act, Congress clearly wanted to eliminate -- not promote -- the balkanization of investigative activities. It is not only absurd, but insulting, for OLC to blame its views on Congress.

XIII. OTHER MATTERS

The IG Act was designed to promote more effective use of the limited resources available to combat fraud, waste and abuse in Federal programs and operations. If OLC has its way, IG investigators who now investigate criminal violations of regulatory programs will no longer be permitted to do so.

Assistant Attorney General Stuart Gerson indicated that lack of OIG resources for such investigations would not be a problem because "specific assurances have been given" that the FBI will handle significant criminal investigations for which no other resource is available.

The source of the "assurances" was not given; moreover, no information was provided as to where the necessary resources would come from, although it is common knowledge that the FBI does not have sufficient resources to fully address its existing priorities. For example, FBI Director William Sessions publicly stated a few weeks ago that, although investigation of white-collar crime is one of its top national priorities, "it is impossible for the FBI to investigate all of the white-collar crime cases that come to our attention."

Dealing with adverse effects of the Kmiec memorandum has already consumed a very substantial amount of IG resources which might otherwise have been put to productive use.

There are significant differences between the qualifications and duties of criminal investigators and those of compliance-related investigators, a fact which appears to have completely escaped the notice of OLC.

XIV. RECOGNITION OF IG INVESTIGATIVE AUTHORITY

Unlike OLC, which opposed the IG Act as "unconstitutional", Justice Department officials charged with enforcement of federal criminal and civil statutes have worked closely with and supported the IG's.

A Justice Department monograph on inspector general subpoenas, published jointly by the Criminal and Civil Divisions in 1987, stated, among other things, that the IG Act "gives the Inspectors General a mandate to conduct audits and investigations for civil, criminal and administrative ends" and that "the power of an agency Inspector General to investigate is essentially the same as the grand jury's."

The Criminal and Civil Divisions, obviously, viewed the broad investigative authority of the Inspectors General as an invaluable asset in fighting fraud and abuse. Another Justice Department official opposed a statutory Inspector General for the Justice Department because it would be too powerful, stating that "The IG would have authority to make whatever investigations he or she might deem appropriate, and the Attorney General would be without authority to halt or redirect those investigations."

Court decisions strongly supportive of IG authority are cited in the body of this report. So far as the writer knows, there are no court decisions giving meaningful support to the OLC position.

XV. ACTIVITIES OF OFFICE OF LEGAL COUNSEL

OLC opposed the IG bill as "unconstitutional" in 1977. The bill was enacted by an overwhelming margin over OLC's opposition, and there are those who believe OLC has been trying to get even ever since.

The same tired arguments that provisions of the IG Act are "unconstitutional" were still being repeated in 1988, even though a number of bills containing such provisions had been approved by Congress and signed by two different Presidents without any effort being made to overturn them in the courts.

In addition to the March 9, 1989, Kmiec memorandum discussed in this report, another Kmiec memorandum was issued on March 24, 1989, ostensibly in response to a request made on June 3, 1987. Like the March 9 memorandum, it was not based on any concrete pending matter; no explanation was given as to why it was being issued nearly two years after it was requested.

According to attorneys for the House of Representatives, the March 24 memorandum "proclaimed that Inspectors General could -- and should -- refuse to give Congress information about agency waste, fraud, and wrongdoing". The House attorneys charged that the position taken by the OLC opinion was exactly opposite to the IG Act's legislative history and characterized the document as "a legally meritless invitation to stonewall Congressional oversight of waste and fraud".

One Inspector General observed that, unlike U. S. Attorney who handle and prosecute criminal cases, OLC attorneys "have had very little experience with the criminal investigative process and other law enforcement practices and procedures." Even a little experience or a very slight effort to look at the facts might well have averted the mess OLC has created for the IG's.

While it has been extremely aggressive in telling IG's how to run their offices, OLC evidently has been less than totally successful in managing its own affairs.

One of OLC's self-described "major objectives" is the timely publication of its own opinions and those of the Attorney General. When it last reported in March 1990, OLC was seven years late in carrying out this assignment. Moreover, the reports indicate that instead of making progress in eliminating the backlog, OLC is actually losing ground.

In March 1989, OLC reported that its 1982 opinions had been published. In 1990, it indicated that the 1982 volume had not actually been published, but that work had finally begun. The 1981 volume was reportedly published in January 1986.

So far as the writer knows, the IG's have been quite successful in submitting their semi-annual reports on time.

The Office of Legal Counsel has no direct statutory authority for its activities and is apparently not even mentioned in the United States Code. Matters assigned to OLC include rendering "informal" opinions and legal advice to government agencies.

Opinions of the Attorney General do not, of course, have the binding effect of court decisions. The courts have expressed the view that "Opinions as to a law held and expressed by the Attorney General are persuasive, and such deference should be accorded to them as given to opinions of other able persons learned in the law but no more." (emphasis supplied)

Informal opinions of the the Office of Legal Counsel, presumably, would be accorded even less deference than formal opinions of the Attorney General.

XVI. ADVERSE EFFECTS OF OLC MEMORANDUM

From a legal standpoint, the OLC memorandum is neither legally binding nor convincing. If it were feasible to do so, the IG's could ignore it and continue theer work. Unfortunately, in spite of its lack of legal merit, the memorandum has had serious detrimental effects on IG operations.

Among other things, the OLC memorandum has resulted in termination of ongoing investigations and prevented initiation of new ones. It has impaired the ability of Inspectors General to cooperate with criminal and civil prosecutors and it has needlessly forced IG's to divert a great deal of time and effort from the accomplishment of their statutory responsibilities.

CONCLUSIONS

1. After 18 pages of discussion, OLC sums up its position by concluding that the IG Act does not authorize Inspectors General to take over responsibility for regulatory program operations, including investigations constituting an integral part of such program operations.

OLC's extended discussion was unnecessary since the IG Act clearly does not authorize Inspectors General to take over program operating responsibilities, a fact which -- so far as is known -- no Inspector General disputes.

2. OLC argues that, if Inspectors General take over regulatory program operating responsibilities, including the establishment of policies for regulatory enforcement:

- it would take away power to control "the investigatory portion of a department's regulatory policy" from regulatory program managers;
- IG's could not perform their intended function as objective critics of "regulatory investigative policy";
- with respect to regulatory programs, there would be no truly objective person to investigate claims of misbehavior and abuse and serve as a check on mistreatment or abuse of the general public by government employees;

These arguments are both unnecessary and confusing, since they are premised on the existence of a hypothetical situation which the IG Act clearly does not authorize.

The further argument that agency heads cannot assign responsibility for regulatory program operations to an Inspector General is also unnecessary, since the IG Act clearly prohibits such transfers.

3. The Kmiec memorandum does not limit its views to regulatory programs. OLC also contends that the "legislative history" of the IG Act shows that Congress intended the Inspectors General to be "internal investigators" responsible for monitoring the integrity and effectiveness of "traditional criminal investigators", but without authority to investigate criminal violations which do not directly involve Federal employees or expenditures.

OLC's view ignores numerous provisions of the IG Act specifically granting broad investigative authority to Inspectors General and the absence of any language whatever limiting that authority to criminal violations directly involving Federal employees or expenditures.

Moreover, OLC's perception of the IG's as "police of the police" is not only totally inaccurate -- it is bizarre. Except for the Justice and Treasury Departments, the IG Act placed almost all "traditional criminal investigators" in IG Offices. If Congress had intended their role to be that of monitoring the activities of the comparatively few criminal investigators outside IG offices, it would have been deliberately providing a dozen or more IG investigators to monitor each non-IG criminal investigator and almost no one to investigate criminal violations.

4. The OLC contention that the IG Act does not authorize Inspectors General to investigate criminal violations which do not directly involve Federal employees or expenditures is clearly erroneous. It has not been upheld by any court. In fact, OLC's position is directly contrary to holdings in court decisions and to views expressed by Justice Department officials charged with criminal and civil law enforcement responsibilities.

5. The fact that OLC's views are erroneous is hardly surprizing, since they admittedly were not based on any specific factual situation and no meaningful effort was made to obtain relevant information about the issues involved.

The authors of the OLC memorandum have displayed a high degree of self confidence and imagination, as well as willingness or even eagerness to advocate bold, far-reaching legal theories. However, an abundance -- or even an overabundance -- of such characteristics cannot compensate for a pervasive lack of knowledge of the subject matter.

6. OLC's opinion does not have the force of law. It will not have such force unless its views are adopted by the courts, an event which is highly unlikely.

7. Even though it does not have the force of law and is without legal merit, the OLC memorandum has caused serious problems for IG's. It has resulted in the termination of ongoing investigations and inhibited the initiation of new ones; it has impaired the ability of IG's to cooperate with Justice Department prosecutors; and it has forced IG's to divert scarce resources from fighting crime to fighting red tape.

8. It is OLC's view that IG criminal investigations involving regulatory programs but not involving Federal employees or expenditures are not authorized because such investigations would take away "the investigatory portion of a department's regulatory policy". In effect, according to OLC, it is the prerogative of regulatory program officials to determine whether or not criminal violations involving their program are to be prosecuted.

If OLC's view is accepted, it would arguably mean that neither IG investigators nor the FBI could investigate looting of financial institutions unless they were given clearance to do so by regulatory program managers.

9. If OLC has its way, some of the most important reforms established by the IG Act would be at least partially reversed. For example:

-the Act authorizes Inspectors General to conduct such investigations relating to administration of the programs and operations of their agency as are, in the judgment of the Inspector General, necessary or desirable; nevertheless, OLC proposes to tell IG's on a case-by-case basis what they can or can't investigate.

-the Act prohibits agency officials from interfering with IG investigations; OLC would give regulatory program managers power to stop IG investigations;

-the Act removed investigators from direct supervision by program managers; OLC now proposes detailing IG personnel to work under program managers;

-IG's were given specific authority and responsbility for referring criminal cases to the Justice Department; OLC would allow program officials to prevent prevent such referrals.

10. In considering the possibility of additional legislation relating to IG authority, Congress should keep in mind that the existing law is not the problem; the OLC opinion is the problem.

There is no assurance that a new law would be the solution, since it is obvious that OLC can turn out bad opinions much faster than Congress can pass good laws. In fact, Assistant Attorney General Barr has already suggested that OLC would review any new IG legislation to determine whether there were "constitutional issues".

Rather than considering the possibility of new legislation to fix something which, except in the jaundiced view of OLC, is not broken, it would be preferable for Congress to first ascertain whether the Attorney General understands and supports the OLC position.

Moreover, in view of the continuing disruptive effect OLC's relatively small group of lawyers are having on the operations of Inspectors General, a thorough review of OLC's activities by Congress and the Justice Department's new Inspector General would be both appropriate and desirable. Specific subject areas which clearly warrant scrutiny include:

-why OLC apparently issues opinions not based on concrete factual situations;

-why OLC is seven years behind in publishing its opinions; and

-whether OLC's seven year unpublished backlog contains additional opinions based on clearly erroneous interpretations of Congressional intent.

I. BACKGROUND

Establishment of Statutory Offices of Inspector General

The Inspector General concept might best be described as the consolidation of auditing and investigative responsibilities under a single high-level official reporting directly to the agency head. 2/

The concept's origin can be traced to a 1962 House Government Operations subcommittee investigation of the activities of Texas swindler Billie Sol Estes, which disclosed that audit and investigative activities of the Department of Agriculture were being conducted by a number of separate and uncoordinated units which reported to officials directly responsible for the programs being reviewed. Disclosure of these organizational and procedural deficiencies led then Secretary of Agriculture Freeman to consolidate USDA auditing and investigative responsibilities under a non-statutory Inspector General reporting directly to the Secretary. 3/

A 1974-75 investigation by the same subcommittee found that "...units responsible for combating fraud and abuse in programs of the Department of Health, Education and Welfare (HEW) were scattered throughout that Department in a haphazard and fragmented pattern, with no single unit having the overall responsibility and authority necessary to provide effective leadership. Moreover, although HEW then had more than 129,000 employees and was responsible for the expenditure of well over $100 billion annually, its central investigative unit had only ten investigators with a ten-year backlog of uninvestigated cases." 4/

In an effort to assure appropriate corrective action, the subcommittee developed and secured the enactment in 1976 of legislation establishing a statutory Office of Inspector General at HEW (the "1976 Act"). The new law assigned overall responsibility for coordination and leadership of HEW's auditing and investigative activities to a Presidentially-appointed Inspector General with no program responsibilities, who would report to both the Secretary and the Congress concerning significant problems, abuses and deficiencies and the progress of corrective action concerning them. The law gave the new Inspector General broad authority to conduct audits and investigations and to obtain necessary information. 5/

Although it had a similar name, HEW's Office of Inspector General was not patterned after previously existing military IG offices and its powers and duties were significantly different.

Comprehensive hearings by the subcommittee in 1977 disclosed serious deficiencies in the organization, procedures, resources and authority of units responsible for audits and investigations in other federal departments and agencies. 6/ As a result, twelve additional statutory Offices of Inspector General were established by the Inspector General Act of 1978 (the "IG Act"). 7/ Other legislation brought the total number of statutory inspectors general to 19 by 1988, including offices at all cabinet departments except Justice and Treasury. 8/

Five more Presidentially appointed Inspectors General, including IG's at the Justice and Treasury Departments, were authorized by the Inspector General Act Amendments of 1988 (the "1988 Amendments"). 9/

The 1988 Amendments also provided for statutory IG's at 33 "designated federal entities". Under the Act, the head of each such entity was required to appoint an IG and to transfer existing audit and/or investigative units (other than those performing audits or investigations as an integral part of program operations) to the Office of Inspector General. Although not Presidential appointees, IG's at designated entities were given essentially the same powers and duties as those appointed by the President. 10/

Problems Leading to IG Legislation

As previously noted, the legislation establishing statutory Inspectors General came about because of serious problems and deficiencies in the organization, procedures, resources and authority of Federal auditing and investigative units, which were disclosed by Congressional investigations beginning in the early 1960's and continuing into the 1970's. Among the major problem areas disclosed were: 11/

Lack of Independence: Personnel of audit and investigative units lacked independence because they reported to and were hired or fired by officials directly responsible for the programs being examined. In some agencies, investigators were not permitted to initiate investigations of complaints without clearance from program officials.

Lack of Effective Leadership: Officials to whom auditors and investigators reported either had program responsibilities or were otherwise unable to devote full time to their audit or investigative responsibilities.

Lack of Effective Organization: Agencies had no central office with overall responsibility for audits and/or investigations; instead, such units reported to different officials and were scattered throughout the agency in haphazard fashion. One department reported having 116 separate audit and investigative units.

Lack of Coordination: Instances were found in which more than one Federal investigation of the same subject matter had been or was being conducted with an almost total absence of effective coordination or communication between or within the departments, agencies, and subunits involved. Moreover, there was usually no single individual who had both the information and the authority necessary to obtain effective coordination.

Lack of Resources: One department had ten investigators with a 10-year backlog of uninvestigated cases; others had internal audit cycles as long as 20 years, while some activities had never been audited.

Lack of Information: Basic information needed by both agency heads and Congress to promote economy and efficiency and combat fraud waste and abuse was simply not available. Most agencies had no affirmative programs to look for possible fraud or abuse; some did not even require employees to report evidence of irregularities.

Mishandling of Criminal Referrals: Although Justice Department officials preferred direct referral of criminal cases to Justice by agency investigators, some agencies required that all such referrals be cleared by the agency's Office of General Counsel. As a result, some potential criminal cases were being held up for months -- or even years -- before being sent to Justice; others were never referred.

Purpose and Nature of IG Legislation

The Inspector General Act of 1978, as amended, contains a number of provisions designed to deal directly with the major problems and deficiencies disclosed by Congressional investigations.

The stated purpose of the IG Act is to create independent and objective units 1) to conduct and supervise audits and investigations relating to the programs and operations of their agency; 2) to provide leadership and coordination and recommend policies for related activities; and 3) to provide a means for keeping the agency head and the Congress fully and completely informed about problems and deficiencies and the necessity for and progress of corrective action. 12/

To help insure IG independence, the law prohibits agency officials from interfering with IG audits, investigations or the issuance of subpenas. If Presidentially appointed IG's are removed, the President is required to communicate the reasons to both Houses of Congress. 13/

The basic duty of each Inspector General under the Act is to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to agency programs and operations. 14/

Inspectors General play a key role in relationships with other agencies, particularly the Department of Justice. Their responsibilities under the Act include coordination of relationships between their agency and other Federal, State or local governmental agencies and non-governmental entities with respect to all matters relating to promotion of economy and efficiency and prevention of fraud and abuse in agency programs and operations.. 15/

In addition, IG's are responsible for coordinating relationships between their agency and other agencies with respect to all matters relating to the identification and prosecution of participants in such fraud or abuse, and are required by the Act to report expeditiously to the Attorney General whenever they have reasonable grounds to believe there has been a violation of Federal criminal law. 16/

The Act requires each Inspector General to keep the agency head and the Congress fully and completely informed concerning fraud and other serious problems, abuses, and deficiencies involving agency programs and operations, 17/ and provides IG's with subpena authority to enable them to obtain information necessary in carrying out their duties. 18/

Acceptance and Successful Operations of IG Offices

The 1978 IG Act was originally opposed by the Office of Management and Budget (OMB) and by all twelve of the departments and agencies affected. 19/ Moreover, the Justice Department's Office of Legal Counsel (OLC) contended that provisions of the proposed legislation were unconstitutional. 20/

Despite this opposition, the proposed legislation passed the House by a vote of 388 to 6, was approved by the Senate without a dissenting vote, and became law on October 12, 1978. 21/

After enactment of the 1978 law, the IG concept was widely accepted. On December 13, 1978, President Carter described the statutory Inspectors General as "Perhaps the most important new tools in the fight against fraud...". 22/

In August 1980, the Deputy Director of OMB publicly called the 1978 Act "...landmark legislation that warrants full and active support of all three branches of the government." 23/ President Reagan subsequently saluted the statutory IG's as "...our first line of defense in attacking fraud, waste, and abuse." 24/

The effectiveness of IG offices is clearly demonstrated by the results of their operations. For example:

-in May 1988, Joseph R. Wright, then Deputy Director of the Office of Management and Budget, stated that IG activities during fiscal years 1981 through 1988 had resulted in savings and cost avoidance of $110 billion and nearly 23,000 successful civil and criminal prosecutions; 25/

-according to Derek J. Vander Schaaf, Deputy Inspector General at the Department of Defense (DOD), 20 of the 100 largest defense contractors were convicted of procurement fraud during the seven years following establishment of the DOD Office of Inspector General. By contrast, according to Vander Schaaf, not one major defense contractor was convicted of such fraud during the preceding four decades. 26/

Issuance of OLC Memorandum

On March 9, 1989, Douglas W. Kmiec, then Assistant Attorney General, Office of Legal Counsel (OLC), Department of Justice, issued a 19 page memorandum ("the Kmiec memorandum") for the Acting Solicitor, Department of Labor. 27/ The memorandum was prepared in response to a September 23, 1988 letter to Kmiec from George R. Salem, then Solicitor of Labor, concerning "the authority of the Inspector General of the Department of Labor to investigate alleged violations of the various statutes over which the Secretary of Labor has enforcement responsibilities."

In the OLC memorandum, Kmiec acknowledged that Inspectors General have broad investigative authority, but contended that the IG Act does not authorize Inspectors General to investigate criminal violations which involve Federal regulatory programs but do not directly involve Federal personnel or money. 28/

II. OLC MEMORANDUM NOT BASED ON FACTS

No Specific Factual Situation Involved

The authors of the OLC memorandum clearly are not lacking in self-confidence, in imagination and in willingness to enunciate bold, far-reaching conclusions. However, an abundance -- or even an overabundance -- of those characteristics cannot compensate for an absence of facts and a pervasive lack of knowledge of the subject matter.

As this report will document, the OLC opinion expressed a view of IG investigative authority which contradicted the position taken by both the Justice Department and the courts during the ten year period since the 1978 IG Act became law. Moreover, it should have been obvious that some of the sweeping conclusions expounded in the Kmiec memorandum -- even though demonstrably without merit -- could have significant adverse effects on IG offices.

Under the circumstances, OLC should have made certain it had sufficient reliable information on which to base an informed opinion. It did not do so. On the contrary, the OLC opinion was not even based on a specific factual situation.

The Office of Legal Counsel initially said it could not give a legal opinion in the absence of a specific factual situation. On October 28, 1988, Assistant Attorney General Kmiec told Labor Department Solicitor George Salem that 29/

> "The question you have posed is whether the IG has authority to investigate alleged violations of various statutes pursuant to which the Secretary of Labor has enforcement responsibility.
>
> However, it is not possible for us to address this question divorced from the facts of a specific dispute. Thus, we ask that you elaborate on the facts at issue."

On December 5, 1988, Salem responded that 30/

> "... you assume that there is some specific matter -- a proposed investigation, for example -- that has caused us to bring this problem to your attention. The facts are quite otherwise. ... the legal question addressed in my memorandum of September 9, 1988 was not presented first to me, and is not now presented to you, either in the context of, or as a result of, a difference of opinion about any particular investigation."

The problem involved, according to Salem, was that "...our Office of Inspector General claims the general authority to investigate any violation of any statute administered and enforced by the Department." 31/

Questionable Accuracy of Information Supplied by Solicitor

Salem attached an appendix to the December 5 letter which he described as "a discussion of specific facts" concerning several cases actually investigated by the DOL Inspector General. However, Salem warned Kmiec that "our information concerning the source of the investigative activity undertaken by the I. G., and the reasons why a given course of action was taken or recommended, is limited". 32/

On December 22, the Labor Department IG told Kmiec that the Salem information contained "numerous factual inaccuracies and distortions." 33/

No Independent Review to Confirm or Obtain Information

Although the accuracy of the information supplied to OLC was questionable, the Kmiec memorandum does not indicate that OLC made any independent review to ascertain what was really happening at the Department of Labor. The memorandum is devoid of any realistic discussion of the activities being carried on and the specific nature of "investigations" being conducted under Labor Department regulatory programs.

Despite the lack of reliable information, the OLC memorandum expressed an opinion concerning the authority of the Labor Department Inspector General. Moreover, it also purported to establish "general principles" universally applicable to "regulatory investigations" without obtaining or even seeking such basic information as:

-the extent and nature of statutes authorizing "regulatory investigations";

-whether all "regulatory investigations" are basically the same, and if not what significant differences are involved;

-the number and types of units engaged in "regulatory investigations"; and

-the duties and qualifications of "regulatory" investigators.

III. CONFUSING NATURE OF OLC MEMORANDUM

Broad IG Investigative Authority Recognized

The OLC memorandum acknowledges that Inspectors General have broad authority to conduct both internal and external investigations: 34/

-of the policies and actions of the Departments and their employees;

-to determine whether recipients of federal funds, such as contractors and grantees, are complying with federal laws and regulations; and

-of individuals or entities not receiving federal funds that are alleged to be involved with employees of the Department in cases involving employee misconduct or other activities involving fraud, waste and abuse

Alleged Limitations on IG Authority

While the IG authority acknowledged by OLC is described in plain language, the alleged limitations on authority of Inspectors General are much harder to comprehend.

In the Kmiec memorandum, OLC expressed the opinion that the Inspector General Act of 1978 (the "IG Act") does not generally give the Labor Department Office of Inspector General authority "to conduct investigations pursuant to statutes that provide the Department with regulatory jurisdiction over private individuals and entities that do not receive federal funds." 35/

Kmiec described such investigations as "regulatory investigations" which "generally have as their objective regulatory compliance by private parties". 36/

Although the OLC opinion was addressed to the Department of Labor, Kmiec stated that it would have applicability beyond that Department, since the IG Act "is a generic one in the sense that its core provisions apply to most of the departments and agencies of the federal government." 37/

While Kmiec argued that Inspectors General do not have direct authority to conduct "regulatory investigations", he did not question their oversight authority with respect to such activities. In Kmiec's words, the Inspector General "may investigate the Department's conduct of regulatory investigations but may not conduct such investigations himself." 38/

Moreover, Kmiec did not challenge the authority of IG's to conduct "regulatory investigations" where such investigations had previously been conducted by units subsequently transferred to an Office of Inspector General. 39/

Kmiec summarized his basic conclusion as follows: 40/

> "All we conclude here is that the [IG] Act does not give the Inspector General the authority to assume these regulatory investigative responsibilities himself."

OLC Supporting Arguments

The basic arguments offered in the Kmiec memorandum to support OLC's contention that Congress intended to prohibit the Inspectors General from conducting "regulatory investigations" were:

-the role of Inspectors General was intended to be that of internal investigators, charged with monitoring the actions of Federal employees and the expenditure of Federal funds; 41/

-allowing such investigations would have constituted a fundamental alteration in the departments' regulatory authority by taking away power to control "the investigatory portion of a department's regulatory policy" from regulatory program managers; 42/

-one of the Inspector General's functions is to criticize regulatory investigative policy, a function he cannot perform if it is his responsibility to set and implement that policy; 43/

-if the Inspector General is conducting regulatory investigations, there would be no truly objective person to investigate claims of misbehavior and abuse and serve as a check on mistreatment or abuse of the general public by government employees; 44/

-authority to conduct investigations "pursuant to regulatory statutes" could not be transferred to an IG because it would not be "properly related" to the Inspector General's functions. 45/

OLC Language Difficult to Fathom

The Kmiec memorandum relies heavily on words and phrases which, by their nature or the way they are used, make rational interpretation difficult or impossible.

For example, the central premise of the OLC opinion is that the IG Act does not give Inspectors General authority to conduct "regulatory investigations". 46/ Consequently, the meaning of the OLC opinion is dependent on the meaning of the term "regulatory investigation".

Kmiec cites no statutory definition of the term "regulatory investigation" and an attempt to find one was unsuccessful. 47/

Two definitions (or perhaps two versions of the same definition) are provided in the OLC memorandum: 1) "investigations pursuant to regulatory statutes" and 2) "investigations pursuant to statutes that provide ... regulatory jurisdiction over private individuals and entities that do not receive federal funds". 48/

While the use of the phrase "pursuant to" makes it reasonably clear that "regulatory investigations" -- whatever they are -- are carried out under the authority of "regulatory" statutes, the definitions are otherwise so broad as to be virtually meaningless.

Moreover, since the OLC memorandum was not based on a specific factual situation, the meaning of the term "regulatory investigation" cannot be clarified by examining, to use the words of Assistant Attorney General Barr, "a concrete case".

Another key term used by Kmiec is "the investigatory portion of a department's regulatory policy". The phrase cannot be found in a dictionary. It is doubtful that it can be found in the words or legislative history of any regulatory statute ever enacted.

Just what does the term mean? Where, if anywhere, is it officially defined? It reminds one of the comedy routine in which a convention speaker introduced as an authority on some subject or other gradually begins spouting totally meaningless phrases until a confused audience finally realizes the whole thing is a joke.

The OLC memorandum does make frequent use of two words which are commonly used and have clearly understood meanings: "authority" and "responsibility".

The two words obviously have very different meanings. According to the American Heritage Dictionary of the English Language, "authority" is "the right and power to command, enforce laws, exact obedience, determine or judge", while "responsibility" is "the state, quality, or fact of being responsible; a duty, obligation, or burden."

However, the Kmiec memorandum -- whether by inadvertence or design -- uses the two words interchangeably. For example:

-the OLC memorandum argues that the IG Act does not give the Labor Department Inspector General "authority" to conduct "regulatory investigations" because Congress intended the IG to be free from general regulatory "responsibilities"; (emphasis supplied) 49/

-the memorandum contends that House Report language concerning assignment of "responsibility" rejects the idea that IG's would have "authority" to conduct "regulatory investigations", although the report language does not even mention "authority"; (emphasis supplied) 50/

-the memorandum further argues that authority cannot be delegated by the agency head under Section 9(a)(2) of the IG Act, when that section actually prohibits transfer of program operating responsibilities and does not mention authority. 51/

Basic OLC Conclusion Undisputed and Unnecessary

The confusing nature of the Kmiec memorandum is clearly illustrated by the fact that, after 18 pages of discussion, it sets forth a basic conclusion which -- so far as is known -- no Inspector General would dispute or ever has disputed.

On page 19 of the memorandum, referring to DOL "regulatory investigative activities", OLC states that:

> "All we conclude here is that the [IG] Act does not give the Inspector General the authority to assume these regulatory investigative responsibilities himself."

The above sentence strongly suggests that OLC's basic concern was that the Labor Department Inspector General was trying or might try to take over responsibility for compliance and enforcement activities from regulatory program officials. No meaningful evidence of such action or intent was presented in the memorandum, and even a cursory inquiry would have shown that there was no realistic basis for such concern.

In fact, the Labor Department OIG does not claim authority to take over regulatory program operations and emphatically denies having any desire to do so. Its position is clearly set forth in testimony by Acting DOL Inspector General Raymond Maria that: 52/

> "...we are not attempting to acquire program operating responsibilities. We have no desire to duplicate, nor have we ever maintained that we have the authority to duplicate, the compliance and regulatory activities of the Department of Labor."

Unfortunately, OLC disregarded the sage maxim "if it ain't broke, don't fix it". Its own approach seems to be more on the order of "if it ain't broke, mess it up".

IV. OLC MISUNDERSTANDING OR IGNORANCE OF FACTS

Bizarre View of Role of IG's

In testimony presented to the Senate Committee on Governmental Affairs in April 1990, William P. Barr, the Assistant Attorney General now responsible for the Office of Legal Counsel, and Stuart M. Gerson, Assistant Attorney General for the Justice Department's Civil Division, undertook to explain portions of the Kmiec memorandum in more understandable and less confusing language.

Their testimony clearly shows how far from reality OLC has strayed. As the next few paragraphs illustrate, OLC's perception of the basic purpose of Inspectors General is not only totally wrong -- it is bizarre.

At the April 1990 Senate Hearing, Gerson defended the Kmiec memorandum, stating that "fully to appreciate the soundness of the views expressed by the Department of Justice, it might be better first to step back to look at the overall concept of an office of Inspector General." Gerson then described the investigative role of IG's as follows: 53/

> "An Executive Branch Department's traditional investigators can be analogized to a police force. The Office of Inspector General, created by statute in 1978, established in-house investigators, a segregated internal affairs arm, if you will, to make certain that fraud, waste and abuse within that police force are ferreted out and lead to punishment.
> (emphasis supplied)

Gerson described the IG investigators as the "police of the police", who are "responsible for assuring that the traditional investigators faithfully perform their roles in pursuing criminal conduct and are not themselves violating the law. 54/

"Traditional" criminal investigators in Federal agencies are in the GS-1811 position classification series. 55/ Before 1978, most criminal investigators in Federal departments and agencies (except for the Treasury and Justice Departments) were in units which were transferred to Offices of Inspector General by the IG Act. 56/

In October 1988, there were approximately 1600 criminal investigators in statutory Offices of Inspector General; 57/ while exact numbers are not readily available, it is likely that there are very few GS-1811's in agency units other than IG offices. The Department of Labor, for example, has no 1811 criminal investigators outside its IG office. 58/

In short, for practical purposes, the IG investigators are the "traditional investigators".

Obviously, there is a crucial flaw in OLC's argument that Congress intended IG's to be the "police of the police", which can be stated very concisely:

There are no police for the "police of the police" to police.

Program Operations and Responsibilities in Federal Agencies

It is clear from the Kmiec memorandum that OLC does not understand the organizational structure and distribution of responsibilities in Federal agencies. Agency units and personnel are not, as OLC seems to think, divided into neat, single-function categories, with no overlapping or concurrent responsibilities or authority.

Inspectors General have oversight responsibility over programs and operations of their agency, which they carry out primarily by conducting audits designed to improve the economy, efficiency and effectiveness of agency programs and operations. However, oversight responsibility is not placed solely in the hands of IG's. Other entities or individuals with oversight responsibilities include the President, agency heads, program managers, OMB, GAO and the Congress.

Inspectors General also have responsibility for prevention and detection of fraud and abuse relating to the activities of their agency. The "prevention" part of this responsibility is undoubtly carried out primarily by securing improved agency procedures. Detection of fraud and abuse, however, may consist mostly of investigations to detect criminal violations by outside organizations and individuals.

Most agency units which conduct audits and investigations involving economy and efficiency are in IG offices. Other types of audits, as well as compliance investigations and many diffent kinds of examinations, inspections and inquiries are conducted by agency regulatory personnel as an integral part of regulatory program operations.

Many agencies have program evaluation units, which exercise oversight responsibility over program operations. Like IG offices, such units have no direct responsibility for program operations; unlike IG offices, such units usually are subordinate to program managers.

All agency employees have at least some responsibility for promoting efficiency and economy in the programs and activities of their agencies. However, program managers may be tempted to ignore waste and inefficiency because exposing it might reflect unfavorably on their own performance. Employees may be reluctant to call attention to problems because they fear retaliation from program managers.

While all employees have a responsibility to report suspected fraud and abuse, they do not have responsibility for criminal investigations. In most agencies, the only employees with the necessary training and experience to conduct such investigations are in the Office of Inspector General. (It should be noted, also, that OIG employees would usually not have the qualifications necessary to conduct some of the highly specialized inquiries made in connection with regulatory programs.)

The Federal Bureau of Investigation usually has concurrent responsibility with IG's for criminal investigations involving agency programs or operations; other Federal law enforcement agencies or state and local authorities may also have jurisdiction over certain types of violations.

In law enforcement agencies such as the FBI and the Drug Enforcement Administration, criminal investigations are a basic part of program operations. For such agencies, Inspectors General clearly have oversight rather than direct responsibility for criminal investigations.

Simplistic Percep~~t~~tion of Federal Regulatory Programs

The OLC memorandum purports to establish "general principles" applicable to all Offices of Inspector general and, presumably, to all Federal regulatory activities. It is clear from the memorandum, however, that OLC's conception of Federal regulatory activities bears little relationship to reality.

The OLC definition of "regulatory investigations" is arguably broad enough to cover any form of investigation, examination or inspection activity conducted pursuant to any "regulatory program" for any purpose. It brings under its massive umbrella an unspecified number of unidentified programs involving widely differing objectives and methods.

If Mr. Kmiec had stepped outside OLC's ivory tower long enough to examine the facts before issuing his opinion, he might have discovered that the federal government is not neatly divided into homogenous groups of "regulatory investigators", IG "internal investigators" and "traditional investigators". He might have learned, also, that federal agencies have an extraordinarily large number of regulatory programs with widely differing objectives involving a variety of investigative and other enforcement procedures. 59/

It would have been obvious that these disparate activities could not possibly be adequately described by a "one-size-fits-all" definition.

The Kmiec definition would include not only compliance investigations, but scientific, economic and other types of inquiries, as well as activities related to licenses, patents, trademarks and passports. It would cover inspections and investigations designed for many different purposes, such as protecting and advancing health and safety, assuring and promoting product quality and effectiveness, detecting harmful substances and hazardous conditions, enhancing competition, establishing rates and preventing the importation of potentially harmful plants and insects.

Knowing the relevant facts is an essential prerequisite to forming a sound legal opinion on a single incident in a single program in a single agency. Yet OLC presumes to pass judgment on legal issues involving many activities in many different programs in many different agencies without even trying to ascertain the facts.

V. MISINTERPRETATION OF STATUTORY AUTHORITY

Statutory Authority for IG Investigations

According to the Office of Legal Counsel, language in the Inspector General Act of 1978 defining the authority of IG's "is not particularly clear". 60/

While the language of the IG Act is undoubtedly not perfect, the Act was carefully drafted so that its meaning would be clear. Words intended to have a special meaning are so defined in the Act; for the most part, however, the words in the Act are commonly used ones defined in any standard dictionary.

Consequently, it is hardly surprising that Federal departments and agencies, the Inspectors General, the courts, and Justice Department officials responsible for prosecuting civil and criminal cases apparently have had little or no difficulty understanding and implementing the language of the Act during the more than ten years since its enactment.

The OLC memorandum cites several statutory provisions describing investigative duties and responsibilities of the Inspectors General: 61/

-Section 4(a)(1) which requires IG's to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to agency programs and operations;

-Section 4(a)(3) which directs IG's to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by the agency to promote economy and efficiency or prevent and detect fraud and abuse in agency programs and operations;

-Section 6(a)(2) which, in addition to the authority otherwise provided by the IG Act, authorizes each Inspector General to make such investigations and reports relating to the administration of agency programs and operations as are, in the judgment of the Inspector General, necessary or desirable.

Significant Provisions Not Mentioned in OLC Memorandum

However, the OLC memorandum fails to discuss -- or even mention - a number of other provisions granting investigative authority to Inspectors General. These include:

-Section 3(a), which prohibits agency officials, including the head of the agency, from preventing or prohibiting the Inspector General from "initiating, carrying out, or completing any audit or investigation, or from issuing any subpena during the course of any audit or investigation."

-Section 4(a)(4)(B) which directs Inspectors General to recommend policies for, and to conduct, supervise, or coordinate relationships between their agency and other Federal agencies with respect to all matters relating to the identification and prosecution of participants in fraud or abuse in agency programs and operations. (The reference to identification and prosecution of participants in abuse, as well as fraud, shows clearly that the word "abuse" includes criminal conduct along with lesser infractions.)

-Section 4(d) which requires each IG to report expeditiously to the Attorney General whenever he or she "has reasonable grounds to believe there has been a violation of Federal criminal law." (This provision was directed specifically at criminal violations not involving Federal employees, since 28 USC 535 already required reporting of information concerning law violations by Federal employees.)

-Section 4(b)(1) requires Inspectors General to comply with audit standards established by the Comptroller General. These standards provide that, in all performance audits, auditors should be alert to situations or transactions that could be indicative of illegal acts. 62/

-Section 5(a)(4) provides for periodic reports to Congress on "matters referred to prosecutive authorities and the prosecutions and convictions which have resulted".

-Section 6(a)(4) provides subpena authority which is clearly intended for use in obtaining documents and information from sources outside the Federal government, since the subsection states that other procedures shall be used to obtain data from Federal agencies

-Section 7(a) states that IG's may investigate information from agency employees concerning the possible existence of activities constituting a violation of law, rules, or regulations, or mismanagement, gross waste of funds, abuse of authority or a substantial and specific danger to the public health and safety."

Section 7(a) was not necessary to provide additional investigative authority for the IG's, since investigations of all the listed activities could be conducted under authority provided elsewhere in the Act. While it was acting on the IG bill, the Senate Governmental Affairs Committee was also considering the establishment of a Special Counsel who 1) would be required to investigate allegations from "whistleblowers" involving the activities designated above; and 2) would be required to protect the identity of employees providing information. 63/

The Senate committee initially considered imposing a mandatory requirement that IG's investigate all "whistleblower" complaints. However, concern was expressed that an IG "might be required by law to undertake a fairly unimportant investigation at the expense of something much more important." 64/

Consequently, the word "may" instead of "shall" was used in Section 7(a) to make the requirement for investigations discretionary instead of mandatory. Section 7(b) imposes a mandatory requirement that IG's protect the identity of employees providing information.

Meaning of "Relating To"

In determining the scope of a statute, the courts look first to the plain meaning of its language; the legislative history is consulted only to determine whether there is a clearly expressed legislative intent to the contrary. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."65/

Section 4(a)(1) of the IG Act provides that it shall be the duty and responsibility of each Inspector General "to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations" of his or her agency. (emphasis added)

Section 6(a)(2) of the Act provides that, in addition to authority otherwise provided by the Act, each Inspector General is authorized "to make such investigations and reports relating to the administration of the programs and operations [of his or her agency] as are, in the judgment of the Inspector General, necessary or desirable." (emphasis supplied)

The OLC memorandum states that the "question presented is the meaning of the phrase 'relating to the programs and operations' in section 4 and 'relating to the administration of the programs and operations' in section 6, as well as similar language elsewhere in the Act." 66/

The answer to the question is obvious. If Congress had intended to limit the jurisdiction of Inspectors General to the employees and expenditures of Federal agencies, it would have used the word "of" instead of the phrase "relating to" and, for good measure, added additional language to make certain its intended limitation was clearly understood. It did not do so.

To the contrary, the phrase "relating to", meaning "having some connection or relationship with", was deliberately chosen to describe the broad jurisdiction Congress intended IG's to have.

No Restrictions on Investigations involving Regulatory Programs

The comprehensive language of the IG Act shows clearly that Congress intended the Inspectors General to have broad investigative authority which would not be subject to control or interference by other government officials.

What the Act does not contain is also highly significant. There is no language whatever in the Act which prohibits an Inspector General from investigating criminal violations involving regulatory programs. Moreover, there is no language which authorizes agency lawyers or regulatory program officials to prohibit, control or interfere with such investigations or with the referral of evidence of criminal violations involving regulatory programs to the Justice Departement.

The omission of such restrictive language was not due to oversight on the part of Congress. The Act actually does permit interference with IG investigations under certain specified conditions, but such interference is allowed at only three agencies.

Section 8 of the Act contains specific provisions authorizing three agency heads -- the Secretary of Defense, the Secretary of the Treasury, and the Attorney General -- to exercise authority over the Inspector General of their own agency with respect to investigations involving certain highly sensitive matters which are specifically described in the Act. If the authority provided in the Act is exercised, the reasons for doing so must be reported to Congress.

The authority granted to the three agency officials does not authorize interference with IG investigations involving regulatory programs unless such investigations also involved one of the highly sensitive matters described in the Act. There is no language in the Act permitting any other official of the executive branch to interfere with any IG investigation, regardless of whether or not it involves a regulatory program.

VI. OLC MISINTERPRETATION OR IGNORANCE OF LEGISLATIVE HISTORY

As the preceding discussion illustrates, the language of the IG Act does not support OLC's contention that Inspectors General lack authority to investigate criminal violations involving regulatory programs. It is hardly surprizing, therefore, that OLC has ignored the plain language of the Act and attempted to make its case by relying on what it claims is the "legislative history" of the Act.

However, OLC has not provided an objective assessment of either the intent of Congress in enacting the IG Act or the purposes for which it was enacted. Whether by design or because of lack of knowledge, the Kmiec memorandum has failed to mention significant statutory language and extremely important aspects of the Act's legislative history, while ascribing great importance to ambiguous language quoted out of context.

The OLC memorandum has presented a picture of the "legislative history" of the IG Act which is incomplete, inaccurate and, in some respects, incredible. Examples of the erroneous nature of the "legislative history according to Kmiec" will be discussed in the following sections of this report.

VII. IG'S NOT LIMITED TO INTERNAL INVESTIGATIONS

Alleged Limitation of IG Investigations

As noted earlier, one of the basic OLC arguments was that Congress intended IG's to be "internal investigators" who would be limited to investigating Federal personnel and expenditures. In the Kmiec memorandum, OLC stated that: 67/

> "The Act does not define terms such as "investigations" and "programs," nor does the Act expressly address whether the [Department of Labor] Inspector General is authorized to conduct investigations pursuant to regulatory statutes administered by the Department. But we think the meaning of the statutory language is clear when examined in the context of the structure and legislative history of the Act."

OLC then claimed that: 68/

> "The legislative history of the Act reflects a consistent understanding that the role of the Inspector General was to be that of an investigator who would audit and investigate the operations of the departments and their federally-funded programs."

OLC's bizarre contention that Congress intended IG's to be, in the words of Assistant Attorney General Gerson, "police of the police" was discussed previously.

It is true, as Kmiec says, that the 1978 Act did not expressly authorize "regulatory investigations". Congress, of course, had no way of knowing in 1978 that OLC would discover "regulatory investigations" in 1989.

Even if it had been able to predict OLC's momentous discovery, there would have been no need for Congress to address the subject because Inspectors General do not conduct investigations pursuant to (i. e. under the authority of) regulatory statutes. As the preceding pages have clearly shown, they conduct investigations under the authority of the IG Act.

"Focus"of the Inspectors General

In support of his contention that Congress intended to limit Inspectors General to the role of internal investigators charged with monitoring the actions of Federal employees and the expenditure of Federal funds, Kmiec cited the following excerpt from the 1978 Senate Report on the IG bill: 69/

> "The [Inspector General's] focus is the way in which Federal tax dollars are spent by the agency, both in its internal operations and its federally-funded programs".

"Focus" is defined as "a center of interest or activity". 70/ In view of the enormous expenditures then -- and still -- being made by agencies covered by the 1978 Act, the Senate committee undoubtedly expected IG's to concentrate a major portion of their efforts on such expenditures.

However, there is nothing in the quoted language to suggest that the Senate committee wanted the IG's to abstain totally from investigations which did not involve tax dollars -- such as, for example, matters involving employee corruption or regulatory programs. The term "focus" may well highlight the center of attention; it does not define the limits of authority.

In fact, although conveniently ignored by Kmiec, the paragraph immediately preceding the quoted language stated that: 71/

> "...the committee intends that the [IG] will assume a leadership role in any and all activities which he deems useful in order to promote economy and efficiency in the administration of programs and operations or prevent and detect fraud and abuse in such programs and operations."

Kmiec also disregarded the statement elsewhere in the report that an Inspector General "is basically a law enforcement official". 72/

OLC Use of Definition that Wasn't There

The IG Act does not contain a definition of "investigation", nor does it need one since the term is in common use and its meaning -- "to examine systematically" or "to observe or inquire into in detail" -- is well understood.

Although the OLC memorandum does not mention it, the version of the IG bill addressed by Senate report 95-1071 did contain a definition of "investigation", which follows: 73/

> "the term 'investigation ' means inquiries and examinations made to detect, or in response to allegations of, irregularities or violations of law, including misconduct, malfeasance, nonfeasance, fraud, or criminal activity on the part of any employee, person or firm directly or indirectly connected with the establishment, or operations financed by the establishment;"

The definition of "investigation" was not included in the IG bill when it was approved by the House, but was added later to the bill as reported out by the Senate committee. The definition was removed by the Senate a few weeks later before the bill was approved.

In January 1984, the Office of Legal Counsel issued a memorandum discussing the investigative authority of the State Department Inspector General. In the memorandum, OLC contended that although the Inspector General had authority to investigate passport and visa fraud involving malfeasance on the part of State Department employees, he did not have authority to investigate passport and visa fraud involving outside persons dealing with the State Department. 74/

To support its position in 1984, OLC contended that the deleted definition required a connection between the State Department and persons being investigated; therefore, OLC argued, it was intended to allow investigations involving employees and contractors but to prohibit investigations of the same crimes involving outside persons dealing with the Department.

OLC further argued that the deleted definition could still be appropriately used as a guide to determine the scope of the IG's authority because "it is apparent that the deletion was effected solely to remove surplus language." 75/

The arguments made by OLC are not just erroneous - they are ludicrous. Any person dealing with the State Department in order to commit or attempt to commit passport or visa fraud obviously has at least an indirect connection with the State Department. Moreover, there is no meaningful evidence in the record to suggest that the Senate definition was intended to limit the authority otherwise granted to IG's.

However, as the 1984 OLC memorandum demonstrated, any statutory definition is potentially subject to attack from persons who argue that the language used should be interpreted more narrowly than the drafters may have intended.

Erroneous Claim Concerning Deletion of Definition

OLC's contention that the definition was eliminated "solely to remove surplus language" is patent nonsense. Had OLC looked at the facts, it would have found that the Senate bill, as reported by the committee, made a number of changes in the House bill. Most of the changes were acceptable to the House sponsors; however, a few -- including the definition of "investigation" -- were not.

The reasons for objecting to the definition of "investigation" were set forth in a memorandum from the writer (then Counsel for the House subcommittee handling the bill) to Representative L. H. Fountain, the subcommittee chairman and House floor manager for the IG bill.

The memorandum, which was written three days after issuance of the Senate report, pointed out that the Senate committee had added definitions for the terms "audit" and "investigation" and commented that: 76/

> This is unnecessary, since the meaning of these are widely understood. Moreover, it has the effect of limiting the authority of IG's to make investigations and audits to activities covered by the definitions. This could result in numerous court actions designed to impede the progress of investigations by challenging the authority of the IG and contending he was outside the scope of his authority."

In order to avoid the necessity for a Senate-House conference on the IG bill, Senate sponsors agreed to offer an amendment deleting the four changes to which House sponsors had objected. The changes were removed, and the House then accepted the amended Senate bill without a conference. 77/

To summarize, although the definition of "investigation" was not intended to limit the authority of the Inspectors General, it was deleted to prevent frivolous challenges by persons or firms claiming that the language used had a restrictive meaning not foreseen by the drafters.

Whatever else can be said about them, OLC's arguments reflect a remarkable degree of ingenuity and boldness. On one hand, OLC argues that the Senate definition is evidence that Congress intended to limit the investigative authority of IG's even though the definition is not in the Act. On the other hand, OLC contends that deletion of the definition -- which necessarily reinstated the virtually unlimited common meaning of "investigation" -- was "solely to remove surplus language". 78/

For want of a better designation, OLC's legal gymnastics perhaps should be referred to as the "have your cake and eat it too" theory of statutory interpretation.

VIII. CONCURRENT JURISDICTION OVER CRIMINAL VIOLATIONS

Erroneous Arguments of OLC

In opposing OLC's view of his authority, the Labor Department Inspector General argued that DOL compliance personnel had no authority to investigate violations of Title 18 (the general criminal statute) involving regulatory programs; if the IG also lacked such authority, there would be no entity investigating such violations. 79/

The possibility of having no one at the Department of Labor with authority to investigate such criminal violations apparently did not concern OLC. The Kmiec memorandum suggested that there would be no problem if Inspectors General were not allowed to investigate suspected criminal violations, because the FBI "has general criminal investigative authority over all violations of federal law." 80/

OLC further commented that it would not be abnormal "if neither the Secretary of Labor nor the Inspector General had criminal investigative authority over some statutory violation that affected the Department of Labor" since "it is not unusual for the FBI to have exclusive criminal investigative authority with regard to certain statutory violations." 81/

The Kmiec memorandum did not identify any regulatory programs over which the FBI "would have exclusive criminal investigative authority."

The DOL IG also contended that when Congress approved the IG Act, it was well aware that non-statutory Offices of Inspector General were investigating criminal violations of regulatory programs by outside parties. As an example, the IG cited investigations by the Department of Agriculture Inspector General involving the grain inspection program. 82/

OLC disputed the IG's contention, stating that evidence the IG submitted did not support his claim.

In effect, OLC 1) suggested that the FBI might have exclusive criminal investigative authority over violations involving regulatory programs; and 2) dismissed as not supported by the evidence the IG's claim that Congress was aware of criminal investigations of regulatory programs by non-statutory IG's when it approved the IG Act .

Concurrent Jurisdiction Over Criminal Violations

It is obvious that OLC did not bother to ascertain the facts before expressing its views.

The Justice Department's basic statutory authority to detect and prosecute crimes against the United States is contained in 18 USC 533. The statute provides specifically that the investigative authority granted to the Justice Department "does not limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies."

The authority of agency investigative units to look into criminal violations involving programs of their agency, including regulatory programs, was well-known to Congress and was unchallenged even before the 1978 IG Act. 83/

The concurrent jurisdiction shared by Inspectors General and the FBI for criminal violations involving agency programs and operations is reflected in memoranda of understanding between IG's and the FBI and in hundreds of joint investigations in which IG and FBI investigators are working together. 84/

Since the FBI relies heavily on cooperation of the IG's in joint investigations, a restriction on IG's would impair their ability to cooperate with the FBI.

IG Investigations Involving Regulatory Programs

The accuracy of the IG's argument could have been verified easily. In fact, the Justice Department itself told Congress in 1975 that the Agriculture Department's non-statutory Office of Inspector General had primary authority and responsibility for investigating criminal violations by grain inspectors (who were not Federal employees and did not receive Federal funds) of two Federal regulatory statutes

The United States Attorney for the Eastern District of Louisiana, testifying with the knowledge of the Attorney General, told a Senate Committee that the OIG's Office of Investigation (now part of the statutory IG office): 85/

> "...has the primary investigative authority and responsibility for violations of the United States Grain Standards Act and the United States Warehouse Act.
>
> The FBI does not have primary jurisdiction over violations of those two Acts. * * * The first line of defense against criminality in the grain trade on the broad front is the Office of Investigation of USDA."

It should be noted, also, that while the FBI clearly has jurisdiction to investigate criminal violations of agency programs, including regulatory programs, it has in the past taken the position that such investigations were not its responsibility.

At the 1977 hearings on the IG bill, for example, an FBI representative testified that the Federal Bureau of Investigation had only recently agreed to investigate some medicare and medicaid cases for possible prosecution under the general fraud statute in Title 18 of the U. S. Code. Before that time, the FBI's position was that medicare and medicaid investigations were the responsibility of HEW because criminal penalties were set forth in Title 42 of the Code. 86/

Moreover, it must be obvious even to OLC that in 1990 the FBI does not have the resources to investigate on a timely basis all criminal violations involving regulation of financial institutions, let alone all other regulatory programs. In the event OLC has its way, if the IG has no authority and the FBI has no time, there will be no investigation -- hardly the result Congress intended when it enacted a statute to combat fraud and abuse.

IX. EFFORT TO STOP INVESTIGATIONS AND PROSECUTIONS

"The Investigatory Portion of a Department's Regulatory Policy"

OLC contends that the legislative history of the IG Act "rejects the idea that Inspectors General would have the authority to conduct regulatory investigations of the type at issue here" because to vest such authority in the IG's would have "taken away the power to control the investigatory portion of a department's regulatory policy" from regulatory program managers. 87/

As noted earlier, the meaning of the term "investigatory portion of a department's regulatory policy" is far from clear.

Attempt to Prevent Referrals for Prosecution

However, a look at the facts discloses that the real issue involved was not whether the DOL IG could take over the "investigatory portion of a department's regulatory policy", but whether the DOL Solicitor could prevent the IG from referring evidence of criminal violations to the Justice Department.

What was really bothering Labor Department Solicitor Salem was described as follows in a December 1988 letter to Kmiec: 88/

> "our Office of Inspector General claims the general authority to investigate any violation of any statute administered and enforced by the Department. The Labor Department Inspector General's Office has in the past exercised such authority, investigating and referring for prosecution a number of violations of statutes falling directly within the enforcement authority of the Secretary and of one of the Secretary's program agency heads (generally Assistant Secretaries) to whom the statutory enforcement program has been delegated by the Secretary. The Inspector General proposes to continue these activities."

This issue was discussed specifically during the 1977 hearings on the IG bill, when a Labor Department witness testified that investigators were not permitted to refer evidence of criminal conduct to the Justice Department; instead they were required to submit the evidence to the Solicitor's office, which might or might not ever refer it to Justice. 89/

Two provisions of the IG Act were designed to end such practices by establishing direct referral of cases by Inspectors General.

Section 4(a)(4)(B) of the Act provides for IG's to recommend policies for and to conduct, supervise or coordinate relationships between his agency and other Federal agencies with respect to all matters relating to the identification and prosecution of participants in fraud or abuse in agency programs and operations. As indicated by the context in which it is used, the word "abuse" was intended to cover any non-fraudulent improper practices which might call for criminal or civil prosecution.

Section 4(d) of the Act requires Inspectors General to report suspected violations of Federal criminal law to the Justice Department.

The Senate report on the IG bill describes the purpose of this provision as follows: 90/

> "Under this legislation, the Inspector General would be required to contact the Justice Department directly, without clearing the referrals with the agency head, the General Counsel of the agency or any other individual in the agency."

The IG Act authorizes each IG "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable;". 91/ (emphasis supplied)

The purpose of the above language, as stated in the House Report, "is to insure that no restrictions are placed upon the Inspector General's freedom to investigate fraud, program abuse and other problems relating to agency activities." 92/ (emphasis supplied)

A fourth provision of the IG Act, Section 3(a), provides that no agency official "shall prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation".

Despite this provision, Deputy Secretary of Labor Whitfield, acting on Salem's advice in September 1988, asked the DOL Inspector General to stop on-going criminal investigations. 93/

OLC's opinion, in effect, supported both the Labor Department Solicitor's efforts to prevent the IG from referring evidence of criminal violations to the Justice Department and the Deputy Secretary's intervention to stop investigations. It did so, moreover, in spite of specific language in the IG Act prohibiting such interference. None of the statutory provisions cited above were discussed or even mentioned in the OLC memorandum.

X. OBJECTIVITY OF INSPECTORS GENERAL

Unrealistic OLC Concern about IG Objectivity

Two additional major arguments in the OLC memorandum relate to the objectivity of Inspectors General. They are:

1) one of the Inspector General's functions is to criticize regulatory investigative policy, a function he cannot perform if it is his responsibility to set and implement that policy; 94/

2) if the Inspector General is conducting regulatory investigations, there would be no truly objective person to investigate claims of misbehavior and abuse and serve as a check on mistreatment or abuse of the general public by government employees. 95/

It would be interesting to know how many regulatory program managers, if any, have established and are implementing "regulatory investigative policies". It would also be interesting to know the extent to which "compliance policies", "inspection policies", "examination policies", "analysis policies", etc. have been established and how they compare with "investigation policies". That information cannot be found in the Kmiec memorandum.

In any event, the establishment of policies for regulatory programs is a part of program operations. Since the IG Act prohibits the assignment of program operating responsibilities to Inspectors General, they may not be assigned responsibility for establishing regulatory enforcement policies.

IG's do have authority, of course, to investigate possible criminal violations involving programs of their agencies, including regulatory programs. Criminal investigations involving regulatory programs would be no more likely to impair an Inspector General's objectivity than investigations of other programs.

Alleged Need for Someone to Watch Over IG's

The second argument is particularly confusing. If, as OLC argues, Inspectors General cannot investigate criminal violations involving regulatory programs because it would leave no one to review their work, the same argument could be used to prohibit all other investigations by IG's.

In view of its perception of IG's as "police of the police", does OLC believe another set of agency investigators is needed to police the IG's?

Such a step hardly seems necessary. Each Inspector General is responsible for guarding against improper conduct by his or her employees. However, that does not mean the Inspector General is the only one who can serve as a check on possible mistreatment or abuse of the general public. The President, agency heads, Congress, and the General Accounting Office come to mind immediately; in cases involving criminal conduct by government employees, the Justice Department would clearly have responsibility to take action.

Of course, whether or not the above entities would be regarded by OLC as "truly objective persons" is a separate question.

XI. TRANSFER OF RESPONSIBILITIES TO IG OFFICES

Arrogant Declaration by OLC

Another argument made by OLC is that authority to conduct investigations "pursuant to regulatory statutes" could not be transferred to an IG because it would not be "properly related" to the Inspector General's functions. 96/

The OLC argument misses the point. Responsibility for program operations, including audits or investigations which constitute an integral part of program operation, clearly may not be assigned to Inspectors General. IG's have no need for transfer of investigative authority since the IG Act provides them with full authority for investigations.

Further comments in the Kmiec memorandum declare that transfer of responsibility for investigations not involving program operations would be prohibited because such transfers would not "further the purposes of the [IG] Act." 97/

While Section 9(a)(2) of the IG Act specifically prohibits transfer of "program operating responsibilities" to an IG Office, it authorizes transfer of such "offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the Office and would, if so transferred, further the purposes of this Act."

OLC's blanket declaration that transfers not involving program operations would not further the purpose of the IG Act is clearly erroneous. It also constitutes, in effect, an arrogant attempt to usurp authority granted by the IG Act to agency heads. Moreover, the OLC declaration was promulgated without review of any specific facts or, apparently, even a passing glance at the legislative history involved.

The IG Act authorizes agency heads to determine whether transfer of responsibilities not involving program operations would further the purposes of the Act. Agency heads were a logical choice because, among other reasons, they are likely to have or be able to obtain information necessary for an appropriate determination. If Congress had not chosen to place decision making authority in the hands of agency heads, it most assuredly would not have entrusted it to the Office of Legal Counsel of the Department of Justice.

Reason for Transfer Provision

The IG Act provision authorizing transfers by the agency head originated in the 1976 Act establishing an Inspector General for the Department of Health, Education and Welfare. The subcommittee which considered the proposed legislation found that HEW had 63 separate units engaged in activities specifically related to the promotion of economy and efficiency, with a total of 3,642 employees directly engaged in such activities. 98/

Most of the entities involved were program evaluation units, which were responsible for reviewing but not operating HEW programs. HEW also had several different investigative units. Only the central audit and investigative units were initially transferred to the new Office of Inspector General; the HEW Secretary was given authority to make additional transfers in appropriate cases, and some additional units have been transferred. 99/

During the 1977 hearings leading to the 1978 IG Act, the agencies eventually covered by the Act were asked to respond to a questionnaire which primarily sought information concerning agency units which conducted audits and investigations or had other duties involving economy and efficiency or the prevention and detection of fraud and abuse. Responses to the questionnaire cover more than 200 pages of the subcommittee hearings, even though small print was used to save space. 100/

A number of audit and investigative units, including some at the Department of Justice, are not part of Offices of Inspector General even though their responsibilities are similar. The Attorney General clearly is not prohibited from transferring those Justice Department units to the IG Office if he finds it appropriate to do so. 101/

Other units with no program responsibilities -- or functions thereof -- could also be transferred under appropriate circumstances. An obvious example of "appropriate circumstances" would be a situation where an agency head believes that an evaluation unit would provide more objective information on program effectiveness if it reported to the Inspector General rather than the program manager.

XII. COORDINATION OF AUDIT AND INVESTIGATIVE ACTIVITIES

OLC Sees "Evil" Where Congress Did Not

In its analysis of the legislative history of the IG Act, OLC tends to discern -- and attach great significance to -- alleged intentions of Congress which were not detected by others. For example, OlC describes the prospect that an Inspector General might conduct "regulatory investigations" as "the very evil Congress wanted to avoid" by creating the IG offices. 102/

It is unlikely that the term "regulatory investigations" appears anywhere in the legislative history of the IG Act. It is almost certain that no member of Congress even remotely connected with the Act ever stated on the record that such investigations were the "very evil" Congress wanted to avoid.

Congress clearly intended, however, to combat some very real and very serious deficiencies; among the most significant were problems involving lack of leadership, lack of effective organization, and lack of coordination of audit and investigative activities. In crafting its version of the Act's "legislative history", OLC totally ignored the clearly expressed concern of Congress about these problems.

Billie Sol Estes Investigation

In 1962, Texas swindler Billie Sol Estes was arrested after a local newspaper story disclosed the extent of his illegal operations. Estes had obtained millions of dollars in loans from finance companies based on non-existent collateral; he was subsequently convicted of mail fraud and other Federal crimes.

Estes' arrest led to a comprehensive Congressional investigation which was a key factor in the eventual development of the 1978 IG Act. 103/ The investigation included a detailed review of transactions by Estes involving the Federal Warehouse Act, a regulatory program. 104/

The investigation did not find evidence of any significant improper conduct by Federal employees. However, it disclosed that Estes' activities had been subject to "an almost unbelievable number" of inquiries and investigations by Federal agencies during a nine year period ending with his arrest. 105/

The Subcommittee also found that the FBI had been given detailed information about Estes" criminal activities a year before Estes was arrested. Instead of prosecuting Estes, however, the Justice Department closed the case without action on the basis of an FBI report indicating that no evidence of a violation of the Federal Reserve Act had been found. 106/

In addition.the Subcommittee found that copies of false financial statements submitted by Estes to the Department of Agriculture in connection with his grain storage operations had been provided to the Internal Revenue Service by USDA six months before Estes was arrested. Although differences in figures on Estes' tax returns amd those on his financial statements made it obvious that he had either evaded payment of income taxes or filed false financial statements, IRS officials never warned USDA that it might have a problem. 107/

The subcommittee concluded that: 108/

> "Had all--or even a few--of the many Federal investigations of Estes' operations been properly coordinated, it is almost inconceivable that his fraudulent activities could have been continued for such a long period. However, most of the many Federal investigations were conducted with an almost total absence of effective coordination or communication between or within the departments, agencies, and subunits involved."

Coordination of HEW Investigations Prohibited

A 1975 investigation found that HEW units with responsibility for prevention and detection of fraud and abuse were "not organized in a coherent pattern" and that there was "no central unit with the overall authority, responsibility and resources necessary to insure effective action against fraud and abuse." 109/

The investigation further disclosed that there were two different investigative units looking into fraud and abuse in the Medicare and Medicaid programs, even though many of the same medical providers were participating in both programs. Moreover, fraud investigators were not even allowed to tell each other which providers they were investigating, even though the same providers might be suspected of fraud under both programs. 110/

The lack of coordination was aggravated by a lack of effective leadership; although prompt corrective action had been promised in 1975, further hearings in 1976 disclosed that HEW regulations still did not permit Medicare and Medicaid investigators to exchange information. 111/

Need for Leadership and Coordination

The need for effective leadership and coordination was spelled out clearly by a Justice Department representative during 1977 hearings. The Chief of the Criminal Division's Fraud Section testified that: 112/

> "Investigations and prosecutions require an ability to muster a variety of resources and put them together frequently as an effective working unit, especially the more significant cases requiring a team effort, if you will.
>
> The ability to have a single contact point is an important ability as far as I am concerned because, in essence, without such effective coordination, we end up with competing priorities each pulling in different directions. We spend more time trying to establish some effective liasom than we do with the investigation."

The legislative history of the IG Act contains overwhelming evidence that Congress was very much concerned about lack of coordination in Federal investigations; there is nothing at all in it to suggest that Congress was concerned about -- or even aware of -- the "evil" perceived by OLC.

There is no logical reason to have two separate units in each agency to investigate fraud and abuse involving Federal programs, one for cases directly involving Federal funds and another for cases which do not, and Congress clearly did not intend to require it when it enacted legislation designed to improve coordination of audit and investigative activities.

The position advocated by OLC would make it more difficult to provide effective leadership and coordination by erecting an artificial barrier separating investigations relating to regulatory programs from similar investigations involving other agency programs. There is not a shred of evidence to justify blaming it on Congress.

XIII. OTHER MATTERS

Resources

Another objectives of the IG Act was to promote more effective use of the limited resources available to combat fraud, waste and abuse in Federal programs and operations.

If OLC has its way, IG investigators who now investigate criminal violations of regulatory programs will no longer be permitted to do so.

In his April 25, 1990 testimony, Assistant Attorney General Gerson indicated that lack of OIG resources for such investigations would not be a problem because "specific assurances have been given that make us comfortable in stating that the FBI will handle significant criminal investigations for which no other resource is available." 113/

Gerson did not identify the source of the "specific assurances". And, while Gerson may feel "comfortable" about receiving such assurances, someone more skeptical might wonder where the necessary resources would come from since it is common knowledge that the FBI does not have sufficient resources to fully address its existing priorities. For example, FBI Director William Sessions stated on March 14, 1990 that, although investigation of white-collar crime is one of its top national priorities, "it is impossible for the FBI to investigate all of the white-collar crime cases that come to our attention." 114/

Dealing with adverse effects of the Kmiec memorandum has already consumed a very substantial amount of IG resources which might otherwise have been put to productive use.

Qualifications and Duties of Investigators

In the 1977 Report on the IG bill, the House Committee on Government Operations noted with concern that the Labor Department then had "only six trained criminal investigators to look into irregularities in the expenditure of some $25 billion annually. 115/

Based on the confusing views expressed in the Kmiec memorandum, OLC seems to be operating under the mistaken impression that all investigators are alike, their duties are interchangeable, and if you've seen one you've seen them all. In fact, the required qualifications for IG criminal investigators are significantly different than requirements for regulatory program personnel who conduct examinations, inspections or compliance investigations as part of their duties.

According to Office of Personnel Management (OPM) Position-Classification Standards, compliance positions may include such tasks as onsite inspections or surveys to assess compliance, negotiations with persons or organizations whose activities have been found to be at odds with mandatory guidelines, analysis of reports required of individuals or organizations engaged in regulated activities, and explaining and promoting the regulatory or compliance program to those whose activities are subject to it and to the general public. 116/

OPM requirements for GS-1811 Criminal Investigating Series positions include a knowledge of investigative techniques, the laws of evidence, the rules of criminal procedure and relevant court decision, as well as skill in applying investigative techniques and the ability to present evidence and advise and assist the United States Attorney in and out of court. 117/

Significant Difference between Compliance and Criminal Investigators

OPM points out one obvious but significant difference between compliance oriented investigations and criminal investigations: 118/

> "If, during the course of a compliance program investigation, possible criminal violations are found, they are typically referred to organizations responsible for criminal investigation where knowledge of federal criminal statutes, rules of criminal procedure, and criminal investigative techniques such as undercover work is of primary importance."

XIV. RECOGNITION OF IG INVESTIGATIVE AUTHORITY

Criminal Division Support for IG Concept

As previously noted, the Justice Department's Office of Legal Counsel opposed the IG Act as "unconstitutional". However, Justice Department officials charged with enforcement of federal criminal statutes were much more supportive. Benjamin Civiletti, then Assistant Attorney General in charge of the Criminal Division (and later Attorney General), did not endorse the OLC opinion and characterized his own position, in general, as "...being in support for the principles in this bill and for the efforts of this committee in this important area which is a part of white collar crime." 119/

Civiletti further stated that it was essential that each agency or department have its own trained investigators or auditors because the FBI did not have the manpower to handle exclusively all of the problems of program fraud and abuse in the agencies. 120/

PCIE Description of IG Investigative Work

A document prepared by the President's Council on Integrity and Efficiency (PCIE) in January 1986 describes IG's investigative work as follows: 121/

> "[All OIGs have] investigation offices which do criminal, civil and administrative investigations of those individuals and entities which may have engaged in fraud or otherwise violated laws and regulations designed to insure and protect the government's programs, beneficiaries and taxpayers "

Justice Department Recognition of IG Authority

A Justice Department monograph on inspector general subpoenas, published jointly by the Criminal and Civil Divisions in 1987, recognized the value of the broad authority given the Inspectors General by the IG Act. 122/

In an introductory statement, the Justice Department endorsed and supported the use of Inspector General subpoenas during OIG audits and investigation because, among other benefits, it would insure "...that the Inspector General's work product can be used to support the full extent of the United States' interest in a given matter. This includes the pursuit of any applicable civil, administrative and contractual remedies as well as criminal prosecution." 123/

The Justice Department monograph further stated that the IG Act "...gives the Inspectors General a mandate to conduct audits and investigations for civil, criminal and administrative ends" and that "the power of an agency Inspector General to investigate is essentially the same as the grand jury's". 124/

Other statements in the monograph included the following:

> "Inspector General subpoenas may be issued in support of criminal, civil or administrative investigations." 125/
>
> "They can be issued to third parties having no privity, contractual, or other direct relationship with the issuing agency." 126/
>
> "Inspector General subpoenas may be used to reach any data or documentary evidence that could be subpoenaed by a grand jury. Inspector general subpoenas can therefore provide the Government with the best opportunity to pursue all available criminal, cvil and administrative options in an investigation." 127/

Justice Department IG Opposed as Too Powerful

The Criminal and Civil Divisions, obviously, viewed the broad investigative authority of the Inspectors General as an invaluable asset in fighting fraud and abuse.

Another Justice Department official cited that same broad authority as a reason for opposing creation of a statutory Inspector General for the Department. In testimony against extension of the 1978 IG Act to the Justice Department, Stephen Markman, Assistant Attorney General, Office of Legal Policy, told the Senate Governmental Affairs Committee that: 128/

> "...under the Act, the IG would provide 'policy direction for and * * * conduct, supervise, and coordinate investigations relating to the programs and operations' of the department. The IG would have authority to make whatever investigations he or she might deem appropriate, and the Attorney General would be without authority to halt or redirect those investigations."

Notwithstanding this opposition, legislation amending the 1978 IG Act to provide for a statutory Inspector General for the Department of Justice became law on October 18, 1988. However, the 1988 amendments did contain special provisions authorizing the Attorney General to prohibit the Justice Department Inspector General from conducting investigations or issuing subpenas under certain specified circumstances. In the event this authority is exercised, at least four Congressional committees must be notified of the reasons for the Attorney General's action. 129/

Court Decisions Uphold IG Investigative Authority

In the Kmiec memorandum, OLC states that it is aware of only one 1985 judicial opinion that is "possibly inconsistent with our opinion" and contends that its opinion is consistent with a number of court cases. 130/

However, the memorandum cites only one case in which a court declined to enforce an IG subpena; that case was heard in the U. S. District Court in Maryland and involved the Montgomery County Crisis Center.

The OLC memorandum cites language from the case, but neglects to mention the court's statement that a questioned subpoena "entrenches upon expectations of privacy of the person making the telephone call, and its enforcement would therefore raise concerns of constitutional dimension" or its conclusion that "This is not an appropriate case in which to define the outer perimeters of the power granted to Inspectors General". 131/

The court further stated that "the existence of power, as well as the wisdom of its exercise, must be determined *within a relevant factual context*." (emphasis supplied)

The above holding of the court was not quoted in the Kmiec memorandum nor, as noted in Section II of this report, was it followed in arriving at the opinions expressed in the memorandum.

Another case cited by OLC as being consistent with its views hardly seems to fit that description. In the Westinghouse case, the court declared that: 132/

> "we believe Congress intended that the courts *accept the Inspector General's determination* of what information is 'necessary to carry out the functions assigned by this Act' so long as the information is relevant to an Inspector General function." (emphasis supplied)

An October 30, 1987 decision by the U.S. Court of Appeals for the D. C. Circuit (the Aero Mayflower case) strongly supports IG investigative authority. In that case, the court stated that Inspectors General: 133/

> "were to provide intra-agency cohesion and a sense of mission in the struggle against waste and mismanagement as well as to further important communication between agencies: 'This type of coordination and leadership strengthens cooperation between the agency and the Department of Justice in investigating and prosecuting fraud cases.'" [quoted language from 1978 Senate Report]

The court then stated that:

> "In service of this end, the Act gives the Inspectors General both civil and crimninal investigative authority and subpoena powers coextensive with that authority."

After noting that, with the exception of the Department of Defense, Inspectors General held *all* departmental investigative powers, the court further stated that: 134/

> "Congress in the statute before us has explicitly *directed* the Inspector General to engage in criminal investigations." (emphasis included in court opinion)

and that:

> "no body of law, whether statutory or regulatory, explicitly or implicitly restricts the Inspector General's ability to cooperate with divisions of the Justice Department exercising criminal prosecutorial authority."

It is interesting to note that Judge Lawrence Silberman, who wrote the Mayflower opinion, served as Solicitor of the Department of Labor and as Deputy Attorney General before being appointed to the bench.

XV. ACTIVITIES OF OFFICE OF LEGAL COUNSEL

Dismal OLC Track Record

The track record of the Office of Legal Counsel in matters involving Inspectors General leaves much to be desired.

In 1977, OLC opposed the concept of oversight by Inspectors General and contended the proposed IG Act was unconstitutional, stating that: 135/

> "our objections to this bill center on its methods, and particularly on the provsions relating to Congress' oversight of the Executive's efforts to promote the goals of economy and efficiency. These methods, in our view, constitute an impermissible infringement on the prerogatives and responsibilities of the Executive and thereby violate the constitutional requirement of separation of powers."

An August 1984 OLC memorandum, discussed in Section VII of this report, contended that the State Department Inspector General had authority to investigate visa and passport fraud if malfeasance on the part of State Department employees was involved, but could not do so if the fraud was being committed by non-employees dealing with the department.

In March 9, 1989, the Kmiec memorandum concerning investigative authority of IG's was issued.

Another Kmiec memorandum was issued on March 24, 1989, ostensibly in response to a request made on June 3, 1987. Like the March 9 memorandum, it was not based on any concrete pending matter; no explanation was given as to why it was being issued nearly two years after it was requested. 136/

According to attorneys for the House of Representatives, the March 24 memorandum "proclaimed that Inspectors General could -- and should -- refuse to give Congress information about agency waste, fraud, and wrongdoing". The House attorneys charged that the position taken by the OLC opinion was exactly opposite to the IG Act's legislative history and characterized the document as "a legally meritless invitation to stonewall Congressional oversight of waste and fraud". 137/

Seven Years Behind and Going in the Wrong Direction

In addition to assisting the Attorney General in his role as legal adviser to the Executive Branch, OLC's stated long range goal is "to provide timely, thorough and reliable legal analysis in response to requests for opinions".

While the March 9, 1989 Kmiec memorandum has clearly failed to meet two of the three characteristics above, it might be considered timely -- at least when compared with the March 24 memorandum.

However, OLC may well deserve recognition in the Guiness book of records for its incredible lack of timeliness in accomplishing -- or more accurately failing to accomplish -- another project.

According to OLC, one of its major objectives is "To continue the practice, begun in 1977, of making publicly available in published form those Office of Legal Counsel opinions that are of general interest to the public." 138/

In March 1987, OLC reported to Congress that opinions of its office for 1980 and 1981 had been published in January 1986, and that: 139/

> "Planning and work has begun on volumes 6, and 7 to contain noteworthy opinions issued in 1982 and 1983. We believe we now have in place ... a structure that will improve the speed of producing these volumes."

Two years later, in March 1989, OLC reported at least some progress, stating that "Volumes covering the years 1977 through 1982 have been issued. Work is currently being done on the volumes for 1983-87." 140/

According to its March 1990 report, however, OLC had not only made no further progress but the 1982 volume had somehow become unissued; the report stated that "Finally, work has begun on Volume 6 and 7 of the Opinions of the Office of Legal Counsel for 1982 and 1983. 141/

Legal Standing of OLC Opinions

The Office of Legal Counsel has no direct statutory authority for its activities and is apparently not even mentioned in the United States Code.

OLC cites 28 U. S. C. 511 and 512 as the statutes on which its authority is based. 142/ Section 511 provides for the Attorney General to give his advice and opinion on questions of law when required by the President. Section 512 authorizes the heads of executive departments to require the opinion of the Attorney General on questions of law arising in the administration of their departments.

Matters assigned to the Office of Legal Counsel include "rendering informal opinions and legal advice to the various agencies of government". 143/ (emphasis supplied)

Opinions of the Attorney General do not, of course, have the binding effect of court decisions. The courts have expressed the following view as to the weight to be given to such opinions: 144/

> "Opinions as to a law held and expressed by the Attorney General are persuasive, and such deference should be accorded to them as given to opinions of other able persons learned in the law but no more."
> (emphasis supplied)

Informal opinions of the the Office of Legal Counsel, presumably, would be accorded even less deference than formal opinions of the Attorney General.

1988 Allegation IG Act Unconstitutional

OLC opinions concerning the IG bill clearly did not have much influence on Congress or Presidents.

Despite OLC's contention that some of its provisions were unconstitutional, the 1978 Act passed the House by a vote of 388 to 6. It was then unanimously approved by the Senate and signed by President Carter.

Thereafter, Presidents Reagan signed additional IG legislation containing some of the same "unconstitutional" provisions objected to by OLC.

Nevertheless, the Justice Department (presumably on the advice of OLC) once again questioned the constitutionality of the IG Act in a June 8, 1988 letter to then House Government Operations Committee Jack Brooks. 145/

The Committee commented in its report that: 146/

> "These arguments were presented to the Congress prior to the passage of [the 1978 IG Act and related laws], but were not accepted. Moreover, the President signed the laws containing the questioned provisions and the committee knows of no effort to overturn them in the courts."

President Bush has since signed a bill creating a statutory Inspector General for the Central Intelligence Agency.

XVI. ADVERSE EFFECTS OF OLC MEMORANDUM

From a legal standpoint, the OLC memorandum is neither legally binding nor convincing. If it were feasible to do so, the IG's could ignore it and continue the work their offices have been doing with considerable success for more than a decade. Unfortunately, in spite of its lack of legal merit, the memorandum has had serious detrimental effects on IG operations, some of which were described at a hearing of thethe Senate Committee on Governmental Affairs on April 25, 1990.

Four Inspectors General and one former IG testified at the hearing. None of them expressed agreement with OLC's legal position. All of them expressed serious concern about the adverse effects of the OLC memorandum. Some of their comments are described below.

Paul Adams, IG at the Department of Housing and Urban Development (HUD), stated that: 147/

> "We believe the opinion is completely contrary to the statutory authority provided in the Inspector General Act."

The adverse effects of the Kmiec memorandum were described by Sherman Funk, Inspector General at the State Department as "by far the most troubling issue which has faced the IGs since passage of the Inspector General Act twelve years ago..". 148/

Richard Kusserow, Inspector General at the Department of Health and Human Services (HHS) said that the OLC memorandum raising jurisdictional issues after IG offices had been operating for as long as 14 years "has caused considerable disruption in agency operations", and had placed his office "in the untenable position of either turning its back on investigations that potentially affect the public health, or compromising our independence." 149/

Sherman Funk described one significant factor which made it difficult to ignore the OLC memorandum: 150/

> [The Justice] department defines the conditions under which it will represent federal employees who are sued in their offical capacity. Thus, if an OIG is operating in ar area questioned by the OLC opinion, and Justice therefore decides that the conduct in dispute is outside the scope of an investigator's legitimate authority, Justice could refuse to represent the IG employees in litigation. Given the cost of obtaining private counsel, and the size of potential judgments, this would have a chillingly repressive effect upon OIG investigations

Kusserow stated that his office had been cautioned by the Justice Department that continued investigation of cases involving the Food and Drug Administration (FDA) could put OIG special agents in jeopardy of personal liability. 151/

James Richards, Inspector General at the Interior Department, pointed out that the OLC memorandum, in effect, raised questions about his authority to investigate fraud in non-payment of between 4 and 5 billion dollars annually received in royalties and other payments from holders of timber contracts or mineral leases on the Federal domain. Richards also noted that: 152/

> "In the past decade, we have developed a close and cordial working relationship with the United States Attorneys, who handle and prosecute the vast majority of our criminal cases. Quite frankly, we do not feel as comfortable with the attorneys at OLC, who have time to be more scholarly and theoretical and, unlike the United States Attorneys, have had very little experience with the criminal investigative process and other law enforcement practices and procedures."

"Helpful" Suggestions from OLC

Assistant Attorney General Barr testified at the April 25, 1990 Senate Committee on Governmental Affairs hearing that the OLC opinion "sought to be faithful to the Congressional purpose of providing independent IGs". He also stated that OLC stood ready to tell IG's whether or not they had authority to carry out particular proposed investigations. 153/

Former Department of Transportation IG John Melchner testified that OLC had suggested that his Office clear any questions about its authority with OLC on a case-by-case basis, after first discussing the situation with the agency General Counsel. 154/

Barr also advised Congress, in effect, that if it wanted IG's to make investigations in areas where OLC had concluded they might not, its only recourse would be to change the law. Barr warned, however, that a new law would also be subject to OLC's scrutiny, stating that: 155/

> "Of course, we would need to review any specific languagge expanding IG jurisdiction, in order to determine whether other constitutional issues that we cannot now foresee have been raised."

Other testimony indicated that the Justice Department had suggested that IG's detail their investigators to work under program managers. 156/

Footnotes

1/ The writer is an attorney and CPA, who served as Counsel, Intergovernmental Relations and Human Resources Subcommittee, House Committee on Government Operations, from 1955 to 1983. In that capacity, he was actively involved in Subcommittee investigations and hearings which disclosed the need for statutory Offices of Inspector General, in drafting the legislation establishing the Offices, and in oversight of activities of the IG Offices.

2/ H. Rept. 97-211, "Statutory Offices of Inspector General (Leadership and Resources)", July 30, 1981, p. 8; hereafter cited as "1981 Report".

3/ Ibid., p. 2.

4/ Ibid., pp. 2-3.

5/ Public Law 94-505, October 5, 1976.

6/ Hearings before a subcommittee of the House Committee on Government Operations (the Intergovernmental Relations and Human Resources Subcommittee) on Establishment of Offices of Inspector General, May 17, 24; June 1, 7, 13, 21, 29; and July 25, 27, 1977; hereafter cited as "1977 Hearings".

7/ Public Law 95-452, October 12, 1978; 5 U.S.C. Appendix 3; hereafter cited as the "IG Act".

8/ H. Rept. 100-1027, "The Inspector General Act of 1978: A 10-Year Review," October 3, 1988, pp. 1-2; hereafter cited as "1988 Report".

9/ Public Law 100-504, October 18, 1988; 5 USC Appendix 3; hereafter cited as 1988 Act.

10/ Ibid., Section 8E.

11/ H. Report 95-584, August 5, 1977, pp. 5-7; hereafter cited as "1977 Report".

12/ IG Act, Section 2.

13/ Ibid., Section 3.

14/ Ibid., Section 4(a)(1).

15/ Ibid., Section 4(a)(4).

16/ Ibid., Sections 4(a)(4) and 4(d).

17/ Ibid., Section 4(a)(5).

18/ Ibid., Section 6(d).

19/ 1981 report, p. 13.

20/ 1977 hearings, pp. 409-410, 831-849.

21/ 1981 report, p. 13.

22/ Remarks at HEW National Conference on Fraud, Abuse, and Error, report of proceedings, p. 23.

23/ 1981 report, p. 14.

24/ Statement of President Reagan on the swearing in of Joseph Sherick as Inspector General, Department of Defense, May 20, 1983.

25/ Hearings before a subcommittee of the House Committee on Government Operations (the Legislation and National Security Subcommittee) on the Inspector General Act Amendments of 1988, May 17, 1988, p. 58.

26/ Washington Post, March 2, 1990

27/ Memorandum for Jerry G. Thorn, Acting Solicitor, Department of Labor, Re: Authority of the Inspector General to Conduct Regulatory Investigations, March 9, 1989; hereafter cited as "Kmiec memorandum".

28/ Kmiec memorandum, pp. 1, 17-19.

29/ Letter from Kmiec to Salem, October 28, 1988, p. 1. A similar policy of limiting legal opinions to specific factual situations was expressed by William P. Barr, Kmiec's successor as Assistant Attorney General, Office of Legal Counsel in a statement presented at an April 25, 1990 hearing before the Senate Committee on Governmental Affairs. Barr declined to express an opinion concerning the scope of IG investigative authority under Section 7 of the 1978 Act (the "whistleblower" provision), stating that: "Generally, it is most productive to interpret statutes in the context of specific facts that can sharpen and illuminate the issues ... * * * ...our office cannot opine on this issue without a concrete case in which the IGs and other interested components of the government could make their views known." (Barr statement, pp. 9-10.)

30/ Letter from Salem to Kmiec, December 5, 1988, p. 1.

31/ Ibid.

32/ Ibid., pp. 3, 5.

33/ Letter from J. Brian Hyland to Kmiec, Dec 22, 1988, p. 4.

34/ Kmiec memorandum, pp. 17, 19; see also p. 17 n. 20.

35/ Ibid., p. 1.

36/ Ibid., p. 1., n. 1.

37/ Ibid., p. 2, n. 3.

38/ Ibid., p. 1.

39/ Ibid., p. 4, n. 6.

40/ Ibid., p. 19.

41/ "The legislative history of the Act reflects a consistent understanding that the role of the Inspector General was to be that of an investigator who would audit and investigate the operations of the departments and their federally-funded programs. See, e.g., S. Rep. No. 1071 at 27 ("The [Inspector General's] focus is the way in which Federal tax dollars are spent by the agency, both in its internal operations and aits federally-funded programs")." (Kmiec memorandum, p. 7.)

42/ "The legislative history also rejects the idea that Inspectors General would have the authority to conduct regulatory investigations of the type at issue here ... because to vest such authority in the Inspectors General would have constituted a fundamental alteration in the departments' regulatory authority. It would have taken away the power to control the investigatory portion of a department's regulatory policy from the official designated by statute or by the Secretary and placed it in an official separate from the regulatory division of the department. ." (Kmiec memorandum, pp. 7-9.)

43/ "The purpose of creating an Inspector General was to have an official in the department who would not have responsibility for the operations of the department and would thus be free to investigate and criticize. If the Inspector General undertakes investigations under the department's regulatory statutes, he could not perform this role. One of the Inspector General's functions is to criticize regulatory investigative policy, a function he cannot perform if it is his responsibility to set and implement that policy." (Kmiec memorandum, p. 10.)

44/ "...with regard to the regulatory investigations the Inspector General would be undertaking, there would be no truly objective person to investigate claims of misbehavior or abuse of the general public by government employees. The purpose of the [IG] Act is not only to protect the taxpayers' money, but also to serve as a check on mistreatment or abuse of the general public by government employees. If the Inspector General, however, is conducting and supervising regulatory investigations of the department, the very evil that Congress wanted to avoid by establishing an objective Inspector General would be created; namely, the responsible official would be charged with auditing and investigating his own office." (Kmiec memorandum, p. 11.)

45/ "Whether or not the conduct of investigations pursuant to regulatory statutes constitutes 'program operating responsibilities' within the meaning of the Act, such investigative authority, as outlined above, is inconsistent with structure and purpose of the Act and cannot be said to be 'properly related' to the Inspector General's functions, nor could the transfer of these functions to the Inspector General be said to further the purpose of the Act." (Kmiec memorandum, p. 12)

46/ Kmiec memorandum, p. 1; see also n. 1.

47/ One possible use of the term "regulatory investigations" (but no definition) was found in statutes requiring certain reports or records by banks and other financial institutions where such reports or records have "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings". (see 12 USC 1829b, 1730d, and 1951.) It is also possible, however, that the reference was intended to cover only regulatory proceedings. Under either interpretation, criminal investigations or proceedings would be distinguished from regulatory activities.

48/ Kmiec memorandum, p. 1; see also n. 1.

49/ Ibid., p. 1.

50/ Ibid., p. 8.

51/ Ibid., p. 11.

52/ Hearing before the Senate Committee on Governmental Affairs, October 3, 1989, p. 85.

53/ Gerson statement, p. 3.

54/ Ibid.

55/ 1988 Report, p. 28, n. 108.

56/ see "Budgetary, Organizational, and Personnel Data on Departments and Agencies Performing Police or Investigative Activities," Report by the General Accounting Office to the Senate Committee on Government Operations, October 1975.

57/ 1988 Report, p. 28.

58/ Hearings before the Senate Committee on Governmental Affairs, September 28 and October 3, 5, 1989, p. 244; hereafter cited as "1989 Hearings".

59/ For example, the Department of Agriculture alone was administering at least 36 different regulatory programs as long ago as 1954. (Yearbook of Agriculture, 1954, pp. 264-265.)

60/ Statement of William P. Barr, Assistant Attorney General Office of Legal Counsel, Hearing before the Senate Committee on Governmental Affairs, April 25, 1990, p. 2; hereafter cited as 1990 Hearing.

61/ Kmiec memorandum, p. 4.

62/ GAO Government Auditing Standards, 1988 Revision, p. A-5.

63/ 5 USC 1206.

64/ 1978 Hearings, p. 20.

65/ Perrin v. United States, 444 U.S. 37, 42 (1979); see also INS v. Cardoza-Fonseca, 480 U.S 421, 432 n. 12 (1987) and United States v. Turkette, 452 U.S. 576, 580 (1981).

66/ Kmiec memorandum, p. 5.

67/ Ibid., p. 6.

68/ Ibid., p. 7.

69/ S. Rep. No. 95-1071, August 8, 1978, p. 27; hereafter cited as "1978 Report".

70/ American Heritage Dictionary of the English Language; unless noted, other definitions are also from this source.

71/ 1978 Report, p. 27.

72/ Ibid., p. 14.

73/ Ibid., p. 53.

74/ Kmiec memorandum, p. 13, n. 16.

75/ Memorandum from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel to Michael G. Kozak, Deputy Legal Adviser, Department of State, August 17, 1984, p. 5.

76/ Memorandum from James R. Naughton, Counsel, Intergovernmental Relations and Human Resources Subcommittee to L. H. Fountain, Chairman, August 11, 1978.

77/ See remarks of Senator Eagleton, Congressional Record, September 22, 1978, p. S. 15870, and those of Rep. L. H. Fountain, September 27, 1978, p. H. 10922.

78/ 1984 OLC memorandum, p. 5.

79/ Kmiec memorandum, p. 5, n. 7

80/ Ibid., p. 6., n. 7.

81/ Ibid.

82/ Ibid., p. 7, n. 8.

83/ see, for example, testimony of Justice Department representatives, 1977 Hearings, pp. 408-441.

84/ see testimony of Floyd Clarke, Assistant Director, Criminal Investigative Division, FBI, before the Legislation and National Security Subcommittee, House Committee on Government Operations, during hearings on The Inspectors General: A 10-Year Review, August 4, 1988.

85/ Hearings before the Senate Committee on Agriculture and Forestry on Grain Inspection Irregularities and Problems, Part 4, September 25, 1975, p. 24.

86/ 1977 Hearings, p. 441.

87/ Kmiec memorandum, pp. 7-8.

88/ Letter from Salem to Kmiec, December 5, 1988, p. 1.

89/ 1977 Hearings, pp. 187-188.

90/ S. Report 95-1071, August 8, 1978, p. 30.

91/ IG Act, Section 6(a)(2); the quoted language was originally contained in Section 4(d) of the IG billl

92/ 1977 Report, p. 14.

93/ Memorandum for J. Brian Hyland from Dennis Whitfield, September 20, 1988.

94/ Kmiec memorandum, p. 10.

95/ Ibid., p. 11

96/ Kmiec, p 12.

97/ Ibid.

98/ House Report 94-1573, "HEW Office of Inspector General", Committee on Government Operations, September 10, 1976, p. 4.

99/ Ibid., p. 6.

100/ 1977 Hearings, pp. 487-700.

101/ House Report 100-771, Inspector General Amendments of 1988, Committee on Government Operations, July 13, 1988; hereafter cited as "House Report 100-771".

102/ Kmiec, p. 12; see also discussion in Section III.

103/ see, for example, testimony of Representative L. H. Fountain, 1978 Hearings, p. 4.

104/ House Report 89-196, "Operations of Billie Sol Estes", Committee on Government Operations, March 22, 1965, pp. 31-34.

105/ Ibid., pp. 21.

106/ Ibid., pp. 355-60.

107/ Ibid., pp. 354-355.

108/ Ibid., p. 22.

109/ House Report 94-1573, September 10, 1976, pp. 12-13.

110/ Ibid., p. 5.

111/ Ibid.

112/ 1977 hearing, p. 409.

113/ Gerson statement, p. 10.

114/ Hearing before House Appropriations Subcommittee, Department of Justice Appropriations for 1991; p. 762; hereafter cited as "Appropriations Hearing".

115/ 1977 Report, p. 7

116/ TS-45, October 1980, p. 3.

117/ TS-8, February 1972, p. 1

118/ TS-45, October 1980, p. 5.

119/ 1977 Hearings, p. 409.

120/ Ibid., p. 412.

121/ "Waste, Fraud, and Abuse", Hearing before the Senate Committee on Governmental Affairs, February 19, 1987, p. 112.

122/ Inspector General Subpoenas, July 1987.

123/ Ibid., p. 1.

124/ Ibid., p. 6.

125/ Ibid., p. 27

126/ Ibid., p. 27

127/ Ibid., p. 29.

128/ Hearings on Inspector General Act Amendments of 1987, May 12, 1987, p. 30.

129/ 1988 Act, Section 8D.

130/ Kmiec, p. 13, note 16.

131/ U. S. v. Montgomery County Crisis Center, 676 F Supp 98, October 7, 1987.

132/ U. S. v. Westinghouse Electric Corporation, 788 F. 2d 164, at 171.

133/ U.S. v. Aero Mayflower Transit Co., et. al., 831 F 2d 1142, 1145-46.

134/ Ibid., p. 1145, n. 3; p. 1146.

135/ 1977 Hearing, p. 833.

136/ Memorandum for Oliver B. Revell, Chairman, Investigations/Law Enforcement Committee, President's Council on Integrity and Efficiency, March 24, 1989.

137/ Memorandum from Steven R. Ross, General Counsel and Charles Tiefer, Deputy General Counsel, Office of the Clerk, U. S. House of Representatives to Hon. Jack Brooks, Chairman, Committee on the Judiciary, May 2, 1989, pp 1-2.

138/ Hearings before a House Appropriations Subcommittee on the Department of Justice Appropriations for 1991, March 8, 1990, p. 372.

139/ House Appropriations Subccmmittee Hearing, March 13, 1987, p. 546.

140/ House Appropriations Subccmmittee Hearing, March 2, 1989, p. 527.

141/ House Appropriations Subccmmittee Hearing, March 9, 1990, p. 375.

142/ Ibid., p. 372.

143/ 28 CFR Ch. 1, Subpart E.

144/ McDonald v. U. S., 89 F 2d 128, certiorari denied 301 U.S. 697.

145/ House Report 100-771, "Inspector General Act Amendments of 1988, July 13, 1988, pp. 6-7.

146/ Ibid., p. 7.

147/ Adams statement, p. 2

148/ Funk statement, p. 1.

149/ Kusserow statement, pp. 3, 16.

150/ Funk statement, p. 7

151/ Kusserow, p. 13

152/ pp. 1-2.

153/ Barr statement, pp. 5, 7.

154/ Melchner statement, pp. 2-3.

155/ Barr statement, p. 14; see also n. 2.

156/ Kusserow statement, p. 16.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

SUMMARY OF OIG INVOLVEMENT IN FOOD AND DRUG ADMINISTRATION CRIMINAL INVESTIGATIONS

Department of Health and Human Services
Richard P. Kusserow
Inspector General

INTRODUCTION

In recent months, there has been considerable confusion surrounding investigations of matters relating to the programs of the Department's Food and Drug Administration (FDA). Serious questions have been raised concerning who may properly conduct these investigations, and the procedures under which these investigations must be coordinated with and referred to the Department of Justice (DOJ). As a result, the Office of Inspector General (OIG) has, effective January 29, 1990, withdrawn from all cases involving violations of the Federal Food, Drug and Cosmetic Act, and has referred those matters to the DOJ.

This report will serve as a summary of OIG involvement in FDA criminal investigations. It is intended to describe the kinds of investigations that were conducted by OIG, our basis for performing those investigations, and our disposition of the cases.

We have requested and are awaiting guidance from the DOJ as to the proper scope of OIG jurisdiction in these matters. Upon receipt of this guidance, the OIG will again investigate those areas that are within our stated jurisdiction.

OVERVIEW/EXECUTIVE SUMMARY

The Office of Inspector General of the Department of Health and Human Services (HHS) is responsible for conducting investigations and audits of programs and operations of the Department. During FY 1990, the OIG obtained 1,278 convictions against individuals and entities who committed offenses against HHS programs. In addition, about 800 civil or administrative actions were secured against health care providers and others who engaged in abusive practices against programs and beneficiaries of the Department.

Among its other responsibilities, the OIG has conducted numerous criminal investigations relating to programs and operations of the Food and Drug Administration, the third largest operating division of the Department, and 1 of 7 major agencies of the Public Health Service. These investigations were conducted at the request of FDA or DOJ officials, or when the violation also involved another program or operation of the Department.

In recent years, the number of investigations in the FDA area has grown substantially from 12 cases to nearly 200 in 1990. This growth reflects the Secretary's efforts to elevate the priority for policing FDA programs; a step that was taken as a result of a number of factors, such as (1) inclusion of FDA's drug enforcement efforts as part of the larger Presidential initiatives related to the war on drugs; (2) new legislation broadening the number of activities that are subject to criminal sanction under the Food, Drug and Cosmetic Act; (3) growth in Congressional interest in the integrity of FDA programs, and (4) concerns of public health risks as a result of corruption.

In 1988, troubling allegations arose indicating corruption in the FDA generic drug approval process and complicity by FDA officials. In response to the increase in FDA-related investigation, and the seriousness of these corruption charges, the Commissioner of FDA, the Inspector General and the General Counsel formally spelled out responsibilities for FDA criminal enforcement, first in a Memorandum of Understanding (MOU), and subsequently in a delegation of authority from the Secretary to the IG. This delegation authorized the Inspector General to conduct independent investigations of felony criminal violations in the FDA area, thereby avoiding the appearance of impropriety in having FDA investigate possible misconduct of its own staff.

In recent months, the Justice Department informed the OIG that pursuant to DOJ policy, all cases relating to programs and operations of the FDA are under the immediate jurisdiction of the Office of Consumer Litigation (OCL) in the DOJ Civil Division. This included all possible remedies -- criminal, civil and administrative -- that might require DOJ action. DOJ further stated that their policy precluded any direct referral of cases to the DOJ Criminal Division or the United States Attorneys. Rather, all complaints, allegations and information concerning fraud, program abuse, corruption or regulatory violations would be directed to a single office within DOJ, the OCL. Officials of the DOJ Civil Division also informed the Department that with the rescission of the Secretary's delegation, as of January 29, 1990, the OIG has no authority to continue any FDA investigation unless it involves employee misconduct or recipients of Federal dollars. According to the DOJ, continued investigation of cases other than these might place our agents in jeopardy of personal tort liability.

In accordance with this policy, we are referring all ongoing cases and new allegations of violations of law involving the FDA. Where we have been involved with other Federal law enforcement agencies in our investigations, we are withdrawing from the inquiry and requesting that they proceed alone. We have notified the U.S. Attorneys that we have withdrawn from these cases, and that we have resubmitted the case and supporting evidence to the OCL.

BACKGROUND

The Inspector General Act of 1978[1] makes it the "duty and responsibility of each Inspector General . . . to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations" of his or her agency. 5 U.S.C. App.3, §4(a)(1).

In discharging this statutory responsibility, the OIG has for many years worked with the Food and Drug Administration when called upon to assist FDA with criminal investigations, or when violations related to other HHS programs, or when we were requested to conduct the investigation by the Justice Department. These investigations most often involved fraud by or upon FDA; an area of unique OIG expertise. We believed that OIG's involvement in investigations acted as a complement to the FDA's regulatory activities, and bolstered the Department's efforts to protect the public health.

In the last two years, several factors transformed this arrangement. First, the number and variety of cases of criminal wrongdoing steadily increased. One factor in this growth has been new legislation, such as the Prescription Drug Marketing Act, that broadened the number of activities subject to criminal sanction under the Food, Drug and Cosmetic Act. The General Accounting Office (GAO) recognized the growing need for HHS to more effectively allocate responsibilities for enforcement of the Food, Drug and Cosmetic Act. In a November 1987 report, the GAO advocated a more active role for the OIG in FDA criminal investigations, and recommended that the OIG and FDA develop an agreement describing that role. **Attachment A.**

Second, and more important, disturbing allegations were made indicating corruption and fraud in the FDA approval process, particularly in the generic drug division. These allegations required investigation by independent reviewers outside FDA to avoid any appearance of conflict of interest or impropriety by FDA. Briefly, in June 1988 the OIG was alerted by the Chairman of the House Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of possible acceptance of payoffs by FDA employees from generic drug companies. Other areas were developed and investigated, involving allegations of fraudulent statements in applications for approval to market drugs, and fraudulent drug substitution in the course of the approval process.

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[1] The OIG at the Department of Health and Human Services was originally established in 1976 pursuant to Public Law 94-505. However, the Inspector General Act Amendments of 1988 repealed this statute, and transferred the office into the "umbrella" Inspector General Act of 1978, Public Law 95-452. The substantive provisions of the two Acts are largely identical.

Recognizing the likelihood of internal corruption, the Subcommittee, as well as the FDA Commissioner, concluded it was important that the Department's investigation of these charges be conducted by the OIG. The independent OIG investigators would not only provide confidence to the Commissioner that internal staff involvement would be rooted out, but it would reassure the public that no cronyism or favoritism would influence the investigation of the drug firms.

Given the growing number of FDA criminal investigations, the attention given FDA enforcement matters by the Congress and the GAO, and the need to restore public confidence in the programs administered by the FDA, it was concluded that the joint enforcement responsibilities of the FDA and OIG should be reinforced in a written Memorandum of Understanding (MOU). The MOU, negotiated carefully over 18 months and signed in January 1989, sets forth certain categories of cases with respect to which each office would concentrate its resources, and acknowledges certain overlapping responsibilities which would continue to require joint efforts and coordinated exchanges of information. Attachment B.

It should be noted that the MOU was intended to "make the most effective and efficient use of the strengths and skills of both organizations." The OIG employs the only GS-1811 series criminal investigators in the Department of Health and Human Services. These investigators are fully trained at the Federal Law Enforcement Training Center operated by the Department of Treasury. All Federal criminal investigators (other than the FBI which has its own academy) receive basic training from this facility. OIG special agents are empowered by statute to exercise special enforcement authorities including issuing subpoenas for records, and taking sworn statements. They have oversight responsibility for all departmental criminal investigations and are therefore trained to identify criminal conduct that violates not only FDA, but all Public Health Service, Medicare, Medicaid, and Social Security statutes. And, when OIG investigators develop information indicating a violation of Federal law, they are required to refer the matter directly to the DOJ Criminal Division through the U.S. Attorneys in the appropriate judicial district for immediate action.

Delegation of Investigative Authority to the OIG

On March 9, 1989, the DOJ Office of Legal Counsel issued an opinion concerning the scope of an Inspector General's investigative authority. That opinion arose in response to a dispute at the Department of Labor (DOL) over the scope of the DOL Inspector General's authority to conduct program compliance investigations for which there were civil, administrative and criminal penalties. The OIG did not have delegated authority to act on these matters, and the Secretary of Labor, the Solicitor, and respective program officials were opposed to the OIG exercise of this authority. The OLC concluded that the IG at Labor did not have inherent authority to investigate these cases because the OIG jurisdiction extended only to grantees, contractors, and agency employees.

Several months later, the DOJ Office of Consumer Litigation contacted the U.S. Attorney's Office in Baltimore which was prosecuting a number of cases involving corruption in the FDA. The substance of the call was that the OLC opinion may apply to FDA matters so as to restrict OIG involvement in those matters. The U.S. Attorney's Office, in turn, alerted the OIG that this opinion, if applied to the working arrangement between FDA and OIG, might bring into question the authority of the OIG to conduct investigations or assist FDA in the conduct of investigations involving pharmaceutical firms, since these cases did not fit any of the narrow categories over which OLC believed the OIG had inherent jurisdiction. In order to sustain successful FDA/OIG efforts, the Commissioner of FDA, with the concurrence of the General Counsel and the Inspector General, recommended to the Secretary that he formally delegate authority to conduct certain felony criminal investigations under the Food, Drug and Cosmetics Act to the OIG. The Secretary did so on July 24, 1989. Attachment C.

The purpose of this delegation was to confirm the IG role in investigations involving fraud or deception by parties doing business with FDA, even though they were not applicants for, nor recipients of, Federal funds, but were, instead, applicants for a Government benefit (i.e., for a license or approval to market a generic drug). It was believed that this would address the possible concerns raised by Office of Consumer Litigation. Under the delegation, the OIG would investigate the following categories of cases:

- investigation of alleged false or misleading statements or misrepresentations in an application for a benefit from, or approval by the FDA, or of alleged failure to provide required information under the reporting requirements governing foods, drugs, cosmetics and medical devices in interstate commerce;

- investigation of the sale or dispensing of counterfeit drugs;
- investigation of the illegal sale or distribution of anabolic steroids; and
- investigation of diversion with regard to the sale or purchase of drug samples, drugs intended for charitable organizations entitled to reduced rates, and the reimportation of drugs into the United States in violation of the Prescription Drug Marketing Act.

The delegation was intended to preserve ongoing OIG investigations being conducted pursuant to the MOU, not to grant new authority over FDA regulatory, compliance or program matters. In the original MOU and subsequent public statements, the OIG emphasized that it had no interest in nor responsibility for noncriminal regulatory matters.

The OIG operated under the delegation for approximately 6 months. In late December the Secretary rescinded the delegation effective January 29, 1990. It is our understanding that the rescission was suggested by the Department of Justice, and effected with their assurance that the delegation was no longer needed.

OIG OPERATIONS UNDER THE MOU AND DELEGATION

Coordination between OIG and FDA in enforcement efforts proved beneficial in many ways. This joint effort avoided duplication and maximized efficiency. It allowed the Department to tap the unique skills and training of personnel in both components. Moreover, utilizing the OIG to assist in criminal investigations also ensured that potential criminal violations relating to all of the Department's programs -- not just those of the Food and Drug Administration -- were identified and pursued. And, in some cases, OIG worked jointly with other Federal law enforcement organizations such as the U.S. Customs Service, FBI, and Postal Inspectors to identify related offenses within their jurisdiction as well.

In our judgment, the OIG was proving successful in its investigation and referral for prosecution of FDA-related cases. As of January 29, 1990, legal actions had been taken in such diverse areas as fraud or false statements to the Government, illegal importation and distribution of illicit steroid drugs, unlawful reimportation of drugs and distribution of samples in violation of the Prescription Drug Marketing Act, drug counterfeiting, falsification of scientific research data, bribery of FDA employees and corruption by those employees, and drug diversion.

Actions taken as a result of OIG investigations include over 30 convictions or arrests pending adjudication or disposition, and 8 employee disciplinary actions or referrals. (These numbers do not include matters involving drugs and medical devices that were successfully prosecuted under authorities pertaining to other programs of the Department.) In addition, numerous referrals of criminal cases were made directly to the offices of the U.S. Attorneys (although some of these cases have been referred to the Office of Consumer Litigation in the DOJ Civil Division, pursuant to their request).

Following is a more detailed discussion of the many and varied cases undertaken by the OIG pursuant to the MOU and Delegation.

FDA Cases Have Wide Ranging Impact

Over the years, the OIG has frequently found itself backing into FDA cases from investigations involving other programs of the Department. This is understandable since many of the HHS programs concerning health and welfare are closely related. The Department is involved in numerous aspects of the pharmaceutical, drug and medical device industries. HHS finances research, both extramural and intramural, through programs of the Public Health Service (PHS), most often the National Institutes of Health. The FDA reviews and approves use of a variety of drugs, devices and pharmaceuticals. The Health Care Financing Administration finances the use of such drugs by our beneficiary populations. The Department also purchases medication and devices for use in the HHS clinical facilities of the National Institutes of Health, Indian Health Service, and the like.

The OIG audit, inspection and investigative staffs monitor these programs and frequently encounter situations in which fraudulent conduct directly affects more than one program. For example, the process of gaining FDA approval for a drug or device also authorizes the use of the product in the Medicare and Medicaid programs. Thus, fraud or corruption in an application for FDA approval may directly cause improper expenditures under Medicare and Medicaid. More importantly, the fraud poses a health risk to the aged, infirm and disadvantaged beneficiaries of those programs. For example, an OIG joint investigation with the FDA and the U.S. Postal Service involved a medical center that was using dimethyl sulfoxide (DMSO) for the intravenous treatment of cancer patients, when neither the drug nor the method of application were FDA-approved. In addition, information referred to HCFA from a Medicare Part B insurance carrier, showed that the center was filing false Medicare and private insurance claims to obtain payment for nonreimbursable DMSO treatment. The former owner of the medical center, and three others were convicted on 36 counts of Federal felony violations, including conspiracy, mail fraud, false statements, and obstruction of justice.

Falsification of scientific research may also have an impact on a variety of HHS programs. Research involving new or experimental drugs that is paid for through grants from the Department may be fabricated or misrepresented in order to ensure continued funding. Yet another oversight problem for the OIG concerns pharmacists who manipulate billings by substituting lower cost generic drugs but bill our health care financing programs for the higher cost innovator drugs.

The Department also engages in the direct delivery of health care services through PHS programs such as the Indian Health Service, Health Resources and Services Administration, community service programs, the clinical center at NIH and others. Drug diversion in these programs is a serious problem. The diversion is accomplished with the collusion of employees of a hospital or clinic, who channel the drugs to individuals who then resell them on the street. Similarly, we have investigated drug salesmen and others who have repackaged both drug samples and recalled products and sold them for use by the unsuspecting public and HHS beneficiaries.

These are only some of the many Department programs that are closely linked with FDA matters, which may make it very difficult to clearly differentiate those cases that are outside OIG jurisdiction.

Corruption in the Generic Drug Approval Process: Substitution of Generic Drugs for Brand Name

In June 1988, the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce received allegations of acceptance of payoffs by FDA employees from generic drug companies. These allegations cast doubt on the integrity of the generic drug approval process at FDA.

Due to the seriousness of these allegations, it was essential that investigative work be conducted by an independent and objective office. Accordingly, the Subcommittee referred the allegations to the OIG. The OIG and the U.S. Attorney for the District of Maryland began investigating and found numerous criminal violations. Other areas were developed and investigated, involving allegations of fraudulent statements in applications for approval to market drugs, and fraudulent drug substitution in the course of the approval process. To document allegations concerning fraudulent drug substitution, drug samples were secured and seized as evidence. Thousands of drugs, for example, were seized from an independent laboratory in Baltimore, Maryland.

In all, these investigations resulted in 8 successful prosecutions to date -- 3 FDA employees have pled guilty to receiving payoffs from generic drug company officials; 3 drug companies have pled guilty to paying such gratuities, and 2 others have pled guilty to conspiracy. Recently, three individuals and another corporation were charged with similar crimes, pending adjudication.

Investigations into Illicit Anabolic Steroids

Although the OIG has only been involved in the investigation of illicit anabolic steroids since early 1989, we have had a great deal of success, with over 25 arrests and convictions. Criminal activities uncovered include: illegal diversion of steroids from legitimate manufacturers; counterfeiting brand name steroid products without FDA approval; smuggling of steroids legally manufactured abroad into the United States; and illegal foreign and U.S. "underground" laboratories.

Steroid cases are often linked with other illegal drug distribution investigations. Therefore, an OIG field office project was established to focus on violations involving illegal use and distribution of steroids, counterfeiting of drugs, and drug diversions. One case involved the manufacturing of counterfeit drugs by a firm which sold them to other firms. These firms then supplied the counterfeit drugs to other firms or directly to the public. In related cases, a pharmacist sold steroids to an undercover agents on numerous occasions, and an individual was illegally distributing steroids at a rate of $150,000 - $200,000 per week.

The OIG worked in conjunction with major national pharmaceutical companies to develop many of these cases. In addition, 14 OI special agents were deputized by the U.S. Marshals Service, as the subjects of the investigation were a danger to the special agents, informants, and the public.

Many States do not have laws to deal with steroid traffickers; therefore OIG involvement in these cases was particularly useful. In one project, OI agents received information from agents of the Drug Enforcement

Administration (DEA) about a man selling steroids to high school students at a Northeast Ohio gymnasium. Working in conjunction with other Federal, State, and local authorities, OI coordinated a 4-month undercover operation in an attempt to penetrate the source. During the investigation, agents obtained information from a confidential informant about a second source of steroids. Other leads were developed. The investigations involved extensive document analysis and interviews with confidential informants, electronic monitoring, controlled purchase situations, and long-term surveillance. In less than a year, the task force's efforts resulted in four convictions, as well as the seizure of a large quantity of steroids and two vehicles used in the illegal trafficking.

The OIG, in conjunction with the FDA, Customs Service and the U.S. Attorney's office, also investigated cases of possible illegal importation and distribution of anabolic steroids. In one case, a Customs Service Mail Inspector opened a registered parcel mailed to the United States from a foreign country. It contained what appeared to be a large number of vials of Primobolan, an anabolic steroid. The individual claiming the package was arrested by USCS agents, and is subject to prosecution smuggling and possession of anabolic steroids with intent to distribute.

In another case, a pharmacy owner was arrested for illegal distribution of steroids. OI agents entered a Brooklyn, New York pharmacy and seized ten boxes of anabolic steroids and business records. The arrest was the sixth in a drug project in the New York City area. The bust came on the heels of a $1,400 buy OI had arranged through a cooperating witness.

Illegal Distribution of Prescription Drug Samples

The Prescription Drug Marketing Act of 1987 (21 U.S.C. § 353) prohibits the distribution of drug samples by a representative of a drug manufacturer or distributor except under certain circumstances. Unless provided to a physician, the product must be intended for sale and may not be distributed for the sole purpose of promoting the drug.

Prior to the rescission of the delegation of authority to work these kinds of cases, OIG agents were involved in an investigation involving an Oregon pharmacy. The execution of a search warrant resulted in the seizure of over three dozen cartons of prescription drug samples. The owner of the pharmacy had been illegally purchasing these from pharmaceutical company representatives, commingling the samples with his regular stock, and dispensing them to customers. Many of the sample packages which were discovered still intact during the search had exceeded their expiration dates. Aside from the adverse economic impact on the pharmaceutical companies who expected these samples to promote their product through physicians, this pharmacy owner risked the safety of the public as expired drugs could be ineffective or unsafe.

Experimental Drugs and Medical Devices Included on Medicare Claim Forms

The OIG has had a number of investigations underway which involve the implantation of intraocular lenses and pacemakers. In these cases, we were concerned with the Medicare reimbursement for such devices and the procedures used in providing these services, in addition to the possible violations of Food and Drug statutes relating to the testing and approval of medical devices.

Fraudulent Business Practices and Drug Sales

Numerous complaints regarding fraudulent business practices and drug sales have been received from consumers, doctors, pharmacies, and drug manufacturing companies throughout the United States. In one state, an OIG investigation indicated that the suspected violators were involved in a conspiracy to distribute non-FDA approved drugs through a network of companies located in another country. Consumers wishing to purchase the drugs sent their payments to the companies in that country; the drugs were then packaged and mailed to a U.S. Post Office, with a return address in the United States. Bank records for individuals and companies involved were subpoenaed. Surveillance efforts were conducted to determine where the drugs are packaged and how the drugs are transported across the border into the United States. The investigation is being coordinated by the U.S. Postal Service, the U.S. Customs Service, and the FDA.

Drug Diversion Involving the Indian Health Service

In 1983, the OIG initiated Project RIP (Remuneration in Pharmaceuticals) to identify the impact of pharmaceuticals violations on the Indian Health Service and other Department programs. Through its RIP operations, the Dallas office became aware of several drug diversion schemes. Pharmaceuticals were being acquired from non-profit sources and subsequently resold for profit.

The Dallas office began work on drug diversion cases, including consensual monitoring of transactions. In 1985, the FBI in Oklahoma City joined the investigation, which had already identified 39 individuals and companies that appeared to be likely targets for prosecution. The joint undercover project continued until 1987, when the investigation was revealed and agents began interviewing and confronting subjects. As a result of the project, 27 convictions have been obtained and $5.8 million has been realized in restitutions, fines, recoveries, and savings.

Counterfeit Prescription Drugs

The FDA referred to our New York Field Office seven interrelated counterfeit drug cases. In each of these cases, distributors were involved in marketing formulated products which, when analyzed against the authentic product, were found to be bogus. In another New York case, diverted drugs were repackaged in counterfeit containers. This investigation, which was well underway at the time the delegation of authority was rescinded, extended to distributors across the entire country.

Falsification of Scientific Data

In one case, a doctor was convicted for various offenses relating to his falsification of research data in clinical studies of new drugs for the treatment of arthritis. The investigation revealed that he had reported results for persons who were not study participants; reported eye examinations, laboratory tests, and x-rays that were not performed; administered drugs other than study medication and failed to report these injections; and reported false medical conditions. He was sentenced to four years' imprisonment, fined $2 million, and ordered to pay $1,866,659 in restitution to the drug companies. Following his conviction, the New Jersey medical licensing board permanently suspended his license.

Other investigations at PHS have disclosed falsification of scientific data by grant recipients, and other allegations are under investigation. Several cases of falsified data and findings have received recent media attention, which has heightened OIG and congressional concern. These investigations give rise to a new area of inquiry. Grantees whose research supports new drug applications might defraud two separate programs of the Department.

Employee Corruption

Some FDA cases involve employee corruption, a traditional area of responsibility for the OIG. In one case, a former FDA medical officer was indicted by a Federal Grand Jury with giving and receiving gratuities and aiding and abetting. It was alleged that, over a four-year period, this employee received over $30,000 from a drug promoter while working on an application for the drug's approval. Although a mistrial was declared, the employee subsequently pled guilty to one count of receiving a salary supplement. He was sentenced to one year's probation and ordered to perform 200 hours of community service.

Effect on Department programs and the public

The FDA is but one agency within the Department of Health and Human Services. However, it has a unique regulatory responsibility to protect American consumers. FDA's efforts are designed to ensure public confidence in the foods they eat, the drugs they take, the medical devices they use, and in the available blood supply. The failure of these efforts adversely impacts on programs such as Medicaid and Medicare.

The OIG noted these adverse impacts during its investigations. For example, improperly approved generic drugs have been prescribed to beneficiaries of HHS programs such as Medicaid. Drug diversion results in artificially high prices for prescription drugs -- prices that must be borne by the Federal health care programs. More importantly, diverted drugs are often improperly handled or stored, posing a health risk to HHS beneficiaries and the public.

Criminal activity can also have an impact on the commercial drug industry. Manufacturers sell drugs to non-profit governmental or charitable organizations at prices significantly lower than those available to for-profit pharmacists. The manufacturers enter into agreements with non-profit organizations that their drugs will not be resold for a profit. Thus the manufacturers are wrongly deprived of their normal profit margins if the drugs are resold for profit.

Anabolic steroids can also have a negative impact on the public. They are known to cause liver cancer, cardiovascular problems, sexual dysfunction, acne, and in females irreversible secondary male characteristics such as body hair growth and baldness. In males, breast enlargement and testicular atrophy can occur as a result of long term use.

Unlawful conduct, such as bribery and false statements pertaining to drug applications, affects the integrity of the drug approval process. The public expects the scientific community to produce accurate and reliable data for our use in making decisions on our health and well-being. Scientific data is used in new drug approvals, in generic drug approval applications, in applications for drug advertising, in new uses for existing drugs, and other purposes.

Criminal conduct in these areas could be extremely dangerous to public health. For example, misrepresentations or acts of omission on the part of medical device manufacturers can affect the integrity of life-saving devices such as apnea monitors or defective pacemakers.

CURRENT STATUS OF FDA INVESTIGATIONS

Effective January 29, 1990, the delegation to the OIG of authority to conduct criminal felony investigations of FDA matters was rescinded. The stated reason for the termination of the delegation was that the immediate need for such a delegation has passed, and that the DOJ Office of Consumer Litigation would "continue to afford these cases the highest priority, both in the investigative and prosecutorial areas."

The Civil Division of the Department of Justice has advised officials of the Department of Health and Human Services that all cases and allegations involving potential criminal conduct related to programs of the Food and Drug Administration are under the immediate jurisdiction of the Office of Consumer Litigation (OCL). That office will receive and evaluate each complaint, and determine its appropriate disposition; that is, whether to initiate or continue investigation of the matter, who should investigate it, whether the matter should be pursued as a civil or criminal one, and if criminal, whether and when the Office of the United States Attorney should be involved.

The Justice Department has further advised HHS that with the rescission of the delegation authorizing the Inspector General to conduct criminal investigations in the FDA area, the OIG has no authority to continue such investigations unless the matter specifically involves misconduct by an employee of the Department or fraud on the part of a recipient of Federal dollars. And, we have been specifically cautioned by OCL that continued investigation of FDA cases puts our special agents in jeopardy of personal tort liability under Bivens.

In accordance with our understanding of the current DOJ policy, we have referred all new allegations and complaints concerning possible criminal violations relating to the Food and Drug Administration to the DOJ Civil Division. All undercover projects and efforts to penetrate criminal rings and conspiracies designed to distribute illicit drugs within the purview of the Food, Drug and Cosmetic Act have been shut down. Where another law enforcement agency has also been involved in an investigation, we have withdrawn from the investigation and requested that the fellow law enforcement organization attempt to complete the investigation alone.

All cases logged into the various U.S. Attorneys Offices, Criminal Division, are being withdrawn with apologies and explanations that DOJ Headquarters has dictated the course of action. Our case files are being forwarded to the OCL, and DOJ has been advised that no further action will be taken by our office, and we consider the matters closed. In those cases where the Office of Inspector General has maintained possession of the physical evidence and grand jury materials to ensure their security and chain of custody, we will hold these items until we are given release authority or direction from the court or DOJ as to their proper disposition.

A list of cases undertaken by the OIG pursuant to the MOU and Delegation is attached. **Attachment D.** Please note the cases that have been referred to the OCL to date.

We continue to strongly believe that violations of the Federal Food, Drug and Cosmetic Act are serious offenses, that potentially endanger the public health and welfare. We hope that they are accorded the attention they deserve.

United States General Accounting Office

GAO

Report to the Subcommittee on Oversight
and Investigations, Committee on Energy
and Commerce, House of Representatives

Attachment A

November 1987

FOOD AND DRUG ADMINISTRATION

HHS Inspector General Should Be Involved in Criminal Investigations

GAO
United States
General Accounting Office
Washington, D.C. 20548

Human Resources Division

B-229146

November 4, 1987

The Honorable John D. Dingell
Chairman, Subcommittee on Oversight
and Investigations
Committee on Energy and Commerce
House of Representatives

Dear Mr. Chairman:

This report discusses the authority of the Food and Drug Administration (FDA) and the Department of Health and Human Services' (HHS) Office of the Inspector General to conduct criminal investigations relating to (1) counterfeit and diverted drugs and (2) the training and resources available to conduct such investigations. The report recommends that the HHS Inspector General become involved in criminal investigations at FDA. The FDA Commissioner and the Inspector General agreed and are taking action to implement the recommendation.

Copies of this report are being sent to the HHS Secretary and Inspector General, the FDA Commissioner, and other interested parties.

Sincerely yours,

Richard L. Fogel

Richard L. Fogel
Assistant Comptroller General

Executive Summary

Purpose

What is the authority of the Food and Drug Administration (FDA) to conduct criminal investigations, and are resources available for such investigations?

Are FDA personnel specifically hired and trained as criminal investigators?

What is the Department of Health and Human Services (HHS) Inspector General's involvement in FDA criminal investigations, and are resources available to conduct such investigations?

The Chairman, Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, asked GAO to respond to these questions because proposed legislation would increase the number of activities subject to criminal sanctions under the Federal Food, Drug, and Cosmetic (FD&C) Act.

Background

Under the FD&C Act, FDA can remove from the market all counterfeit drugs (forgeries of legitimate drugs) and diverted drugs (removed from the normal distribution channels) that are adulterated or misbranded or both. Persons and firms violating the act's provisions can be prosecuted and fined from $100,000 to $500,000. These violators can also be imprisoned for up to 3 years.

The Prescription Drug Marketing Act of 1987 would, if enacted, amend the FD&C Act and (1) ban, regardless of whether products were adulterated or misbranded, the "reimportation of drugs produced in the U.S." (except in emergency situations) and (2) restrict the distribution of drug samples and certain resales of drug products. Violators could be fined not more than $1,000,000 and imprisoned for not more than 10 years.

Results in Brief

The FD&C Act authorizes FDA to plan and conduct inspections of FDA-regulated industries to protect consumers. The FDA employs consumer safety inspectors and officers with the scientific background and training needed to carry out FDA's various program responsibilities. FDA safety inspectors and officers collect information for use in criminal prosecutions and, when FDA deems necessary, seek specialized criminal investigative skills of other federal agencies, such as the Federal Bureau of Investigation. FDA does not hire nor specifically train its personnel to become criminal investigators.

Although the HHS Inspector General has authority to conduct criminal investigations of FDA programs and activities, the Inspector General conducts investigations relating only to allegations of criminal wrongdoing involving an FDA employee. The HHS Inspector General hires and trains personnel to become criminal investigators and conducts all criminal investigations for HHS agencies other than FDA.

FDA has been involved in a limited number of counterfeit and diverted drug investigations. If the proposed legislation is enacted, the number of criminal investigations could increase. The Inspector General believes he can assume this added responsibility without additional resources and that he should be involved in all FDA criminal investigations. Increasing the HHS Inspector General's involvement in FDA criminal investigations is an appropriate alternative to FDA's (1) hiring criminal investigators, (2) providing its safety officers with criminal investigative training, or (3) relying on other federal or state agencies.

Principal Findings

FDA and HHS Inspector General Have Authority to Conduct Investigations

FDA can inspect (1) any domestic factory, warehouse, or establishment in which drugs are manufactured, processed, packed, or held for introduction into interstate commerce or (2) any vehicle used to transport drugs in interstate commerce. FDA can seek, through the Department of Justice, the prosecution of persons and firms violating provisions of the act.

The Inspector General is also authorized to (1) direct and conduct inspections, audits, and investigations related to fraud, waste, and abuse in all HHS programs and operations and (2) identify and recommend to Justice that participants involved in such activities be prosecuted.

In 1981, Justice commented that the legislation establishing the HHS Office of the Inspector General (OIG) was generally not intended to replace FDA's regulatory function, such as investigating possible violations of the FD&C Act. However, Justice noted that it envisioned situations where the Inspector General, FDA, or both would investigate alleged violations of the FD&C Act. Justice suggested that FDA be given an opportunity to review matters investigated by the Inspector General before any referrals to Justice for criminal prosecution.

FDA Has Investigated the Counterfeiting and Diversion of Drugs

FDA officials commented that they have been involved in criminal investigations for many years, but do not distinguish these investigations from their normal surveillance work, which may result in discovery of a criminal act. Evidence developed during the routine inspection of a regulated firm could result in a possible criminal prosecution. Investigations involving counterfeit drugs may require more extensive investigational time and effort, including assistance and increased coordination with the Federal Bureau of Investigation and U.S. attorneys.

In the last 16 years, FDA has been involved in criminal investigations of six counterfeit drug cases. Three cases resulted in violators' being imprisoned or fined or both, persons were indicted in a fourth case, and a grand jury was requested in a fifth case. FDA continues to investigate the remaining counterfeit case.

In addition, FDA, since 1985, has been involved in a joint investigation with the Federal Bureau of Investigation of a major drug diversion case. According to FDA, as of July 1987, 28 persons have been convicted. FDA's investigation of three other significant drug diversion cases did not disclose evidence of adulteration or misbranding. Since February 1986, FDA has also followed up on 11 reports of allegedly diverted drugs that were misbranded or adulterated. Of the eight investigations completed, six have not disclosed diversion activities or criminal wrongdoing.

FDA officials told GAO that because of the small number of counterfeit and diverted cases FDA has been involved in over the past several years, resources have not been specifically designated for the investigation of such cases.

FDA Hires Consumer Safety Inspectors and Officers

FDA hires and trains consumer safety inspectors and officers to do inspections, sample collections, and special investigations to verify that FDA-regulated products or manufacturers (or both) are in compliance with requirements of the FD&C Act.

FDA has about 780 consumer safety officers in its district offices. The Office of Personnel Management standard for FDA consumer safety officers requires a knowledge of basic science. In addition, during the first 6 months of employment, they receive on-the-job training and classroom instruction related to doing FDA inspections.

FDA officials estimated that the agency would require an additional 30 full-time-equivalent positions, costing $1.5 million, to implement the proposed legislation. Such resources would also be used to implement regulations and maintain liaison with the drug industry, but would not be used to hire criminal investigators.

OIG Hires and Trains Criminal Investigators

OIG hires persons with investigative skills to fill its criminal investigator positions. The Office of Personnel Management standard specifies that criminal investigators have a primary knowledge of investigative techniques and be skillful in such activities as maintaining surveillances, performing undercover work, making arrests, and taking part in raids. Throughout their careers, criminal investigators receive various training and have access to specialized equipment related to conducting investigations. In addition, criminal investigators must complete an 8-week training program, sponsored by the Federal Law Enforcement Training Center in Glynco, Georgia.

The Inspector General believes OIG should be involved in FDA criminal investigations because OIG conducts criminal investigations for other HHS agencies and has 261 investigators that are specifically hired and trained to conduct such investigations. The Inspector General stated that OIG could carry out FDA criminal investigations with current resources.

Recommendation

GAO recommends that the Secretary of HHS direct the FDA Commissioner and the HHS Inspector General to develop and implement a plan for involving the Inspector General in FDA criminal investigations. Such a plan should identify the types of FDA investigations that will be referred to the Inspector General, when such referrals should be made, and the specific responsibilities of FDA and Inspector General personnel in carrying out criminal investigations.

Agency Comments

The HHS Inspector General stated, in a September 1987 letter, that (1) he and the FDA Commissioner generally agreed with the report's findings and (2) FDA and OIG staff will meet over the next several months to identify specific approaches to address the recommendation.

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Abbreviations

FBI	Federal Bureau of Investigation
FDA	Food and Drug Administration
FD&C	Federal Food, Drug, and Cosmetic
HHS	Department of Health and Human Services
OIG	HHS Office of the Inspector General
USDA	U.S. Department of Agriculture

Chapter 1

Introduction

FDA is responsible for protecting the public from unsafe or ineffective drugs. It derives its authority from the Federal Food, Drug, and Cosmetic (FD&C) Act, which prohibits distribution of adulterated or misbranded drugs in the United States or their importation. Adulterated drugs are those that are defective, unsafe, filthy, or not produced in conformity with current good manufacturing practices; misbranded drugs include those on which labeling is false, misleading, or lacking in sufficient facts to provide important or required information. FDA has authority to remove from the market all counterfeit drugs—forgeries of legitimate drugs—regardless of whether they are misbranded or adulterated. Diverted drugs—drug products removed from normal and usual channels of distribution—can now be removed by FDA only if they are adulterated or misbranded.

In general, the act permits FDA to inspect (1) any domestic factory, warehouse, or establishment in which drugs are manufactured, processed, packed, or held for introduction into interstate commerce or (2) any vehicle used to transport drugs in interstate commerce. The act requires that domestic drug manufacturers be inspected at least once every 2 years. FDA also has authority to inspect foreign manufacturers' products at various U.S. points of entry and can investigate instances where there is evidence that a violation of the act has occurred or may occur.

FDA has been provided with specific investigative authority relating to counterfeit drugs. Section 702(e) of the act permits any Department of Health and Human Services (HHS) officer or employee to (1) conduct examinations, investigations, or inspections of counterfeit drugs and (2) when authorized by the Secretary, carry firearms and serve and execute search and arrest warrants.

Diverted drugs include (1) those that have been manufactured in the United States for foreign markets and returned to the United States by parties other than the original manufacturer, (2) the sale of physician drug samples, and (3) the resale of drugs bought by institutions at reduced prices. By removing drugs from the usual channels of distribution, there is a potential for manipulating the drugs in ways that could result in their becoming adulterated or misbranded or both under the FD&C Act. FDA officials told us that diverted drugs have to be adulterated or misbranded before FDA can take action to remove them from the marketplace. For example, the sale of physician samples does not constitute a violation of the FD&C Act.

Legislation, proposed in the 100th Congress, would amend the FD&C Act, providing FDA with additional authority for regulating diverted drugs. This legislation—Prescription Drug Marketing Act of 1987 (H.R. 1207 and S. 368)—if enacted, would ban the "reimportation of drugs produced in the United States" (except in emergency situations), place restrictions on the distribution of drug samples to physicians, and ban certain resales of drugs by hospitals and other health care facilities. Violators would be imprisoned for not more than 10 years or fined not more than $1 million or both.

FDA officials estimated that the agency would require an additional 30 full-time-equivalent positions, costing $1.5 million, to implement this legislation. Such resources would be used to implement regulations, establish new or revised surveillance programs to ensure compliance with the legislation, and maintain liaison with the drug industry. FDA officials pointed out that these resources would not be used to hire or train criminal investigators.

The FD&C Act provides FDA with authority to seek court-ordered seizures and injunctions for removing or keeping adulterated and misbranded products from the market. In addition, an FDA attorney stated that the Federal Rules of Criminal Procedures allow FDA to obtain criminal search warrants, which authorize FDA to seize all evidence of criminal activity. Persons and firms can be prosecuted or fined or both for violating provisions of the act. Depending on the circumstances, violators can be fined from $100,000 to $500,000 under the Criminal Fines Enforcement Act of 1984. The first conviction can result in imprisonment for up to 1 year; however, if the violator had the intent to defraud or mislead, the conviction can result in imprisonment for up to 3 years. A second conviction can also result in imprisonment for up to 3 years. On the average, about 20 persons or firms are prosecuted annually for all violations of the FD&C Act. The process of initiating any of these legal actions requires clearances from FDA district, regional, and headquarters offices as well as interaction with the Department of Justice and other federal agencies.

FDA does not have authority to detain adulterated and misbranded domestic food and drug products to prevent their entering the marketplace. It can, however, detain other FDA-regulated products, such as medical devices and imported products. We have recommended, in other reports, that Congress amend the FD&C Act to give FDA detention authority.[1]

Objectives, Scope, and Methodology

In a June 1986 letter and in subsequent meetings with his office, the Chairman of the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, asked us to provide information on the authority of FDA and the HHS Office of the Inspector General (OIG) to conduct criminal investigations relating to (1) counterfeit and diverted drugs and (2) the training resources available to conduct such investigations. We determined

- how FDA detects and monitors drug counterfeiting and diversion activities,
- the number of FDA personnel that are specifically trained to conduct criminal investigations of drug counterfeiting and diversion, and
- OIG's authority and involvement in FDA's criminal investigations and the OIG resources available to conduct criminal investigations.

We were also asked to provide information on FDA's legal authority to obtain search warrants, detain counterfeit and diverted drugs, and refer cases to OIG and the Department of Justice.

We did the majority of our work at FDA headquarters in Rockville, Maryland; here we obtained information on headquarters and field office policies, procedures, and resource allocation for conducting investigations of drug counterfeiting and diversion activities. We also obtained information from the following: the headquarters offices of OIG, the Office of Personnel Management, the U.S. Department of Agriculture (USDA) Food Safety and Inspection Service and Office of the Inspector General, and the Federal Bureau of Investigation (FBI) in Washington, D.C.; U.S. Pharmacopeial Convention, Inc. (a private organization) in Rockville, Maryland; and the Federal Law Enforcement Training Center in Glynco, Georgia.

We interviewed FDA officials to discuss FDA policies for conducting criminal investigations and officials' efforts to regulate the counterfeiting and diversion of drugs. We reviewed records and developed information on FDA's involvement in drug counterfeit cases—six over the past 16 years. In addition, we obtained information on 15 FDA investigations of reported allegations of drug diversion. We also reviewed FDA reports of diverted drugs involving the return of American drugs, between October 1986 and February 1987, to the United States.

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[1] GAO reports recommending detention authority include Legislative Changes and Administrative Improvements Should Be Considered for FDA to Better Protect the Public From Adulterated Food Products (GAO/HRD-84-61, Sept. 26, 1984) and Legislative and Administrative Changes Needed to Improve Regulation of Drug Industry (GAO/HRD-83-34, Apr. 5, 1983).

We discussed with FDA officials and obtained documentation on the number of FDA personnel that can conduct criminal investigations and their involvement in counterfeit and diverted drug cases. We reviewed the qualification standards, training requirements, and summary descriptions of training courses provided for these personnel. Because of the availability of this information at FDA headquarters, we did not visit any FDA district offices.

Officials at U.S. Pharmacopeial Convention were also interviewed to (1) determine what role they play in FDA's efforts to identify drug counterfeiting and diversion activities and (2) obtain information on reports they receive concerning these activities. FDA contracts with U.S. Pharmacopeial to administer FDA's Drug Product Problem Reporting Program, which solicits and receives information from pharmacists on problem drugs.

We also met with officials of OIG and obtained and reviewed documentation to determine (1) its authority and role concerning FDA criminal investigations of drug counterfeiting and diversion, (2) the qualifications and training requirements of a criminal investigator, and (3) the criminal investigative resources it has available. We also reviewed the position description of a criminal investigator, which was obtained from the Office of Personnel Management.

Officials at USDA's Food Safety and Inspection Service and Office of the Inspector General were interviewed because of similar regulatory responsibilities to protect the consumers from adulterated and misbranded meat and poultry. We obtained information on the roles and responsibilities of both offices in conducting criminal investigations.

Our work was done between July 1986 and July 1987 in accordance with generally accepted government auditing standards.

HHS Inspector General Should Be Involved in FDA Criminal Investigations

Both FDA and OIG have authority to conduct criminal investigations involving FDA programs. Although FDA has recognized the need to obtain criminal investigative assistance for some of its investigations of drug counterfeiting and diversion activities, it has not involved OIG in these investigations. FDA personnel assigned to these investigations have not been hired or trained as criminal investigators, but OIG has criminal investigative resources that could be used in FDA criminal investigations. Nevertheless, when assistance was needed in criminal investigations concerning its programs, FDA worked with the FBI and other federal and state agencies.

FDA and OIG Have Authority to Conduct Investigations

Through the Department of Justice, FDA has authority to seek the prosecution of persons and firms violating provisions of the FD&C Act. Violators can be fined or imprisoned or both. In addition, as mentioned earlier, section 702(e) of the act permits any HHS officer or employee to (1) conduct examinations, investigations, or inspections of counterfeit drugs and (2) when authorized by the Secretary, carry firearms and serve and execute search and arrest warrants. Although this authority has been delegated to FDA, it has not used such authority in conducting past investigations of counterfeit drugs. However, FDA officials recently advised us that it may be necessary to use the authority in section 702, and they are developing procedures for implementing this section.

FDA officials commented that they have been conducting criminal investigations for many years, but do not distinguish them from their normal surveillance work, which may result in discovery of a criminal act. For example, officials noted that evidence developed during the routine inspection of a regulated firm could result in a possible criminal prosecution. They also noted that special investigations of counterfeit drugs would be handled the same as other FDA investigations, except that these investigations may require more extensive time and effort, as well as the assistance of and increased coordination with the FBI and U.S. attorneys.

Public Law 94-505, enacted October 15, 1976, authorizes OIG to (1) direct and conduct audits and investigations related to fraud and abuse in HHS programs and operations and (2) identify and refer for prosecution participants involved in fraud and abuse. In 1981, the HHS general counsel asked the Department of Justice to clarify the procedures for OIG's referring possible violations of the FD&C Act to Justice for consideration of criminal prosecution.

Justice commented that it believed the legislation establishing OIG's authority to conduct criminal investigations was, generally, not intended to replace the regulatory function of FDA, such as investigating possible violations of the FD&C Act. However, Justice noted that it also believed that OIG was authorized to investigate allegations of improprieties relating to programs and operations of HHS; Justice envisioned situations where OIG or FDA or both would investigate alleged violations of the FD&C Act. Justice suggested that FDA be given an opportunity to review matters investigated by OIG before any referrals to Justice for criminal prosecution.

Because FDA has criminal enforcement powers, OIG has made it a practice to do criminal investigations of FDA activities only when these investigations involve an allegation of criminal wrongdoing by an FDA employee. Between January 10, 1983, and November 18, 1986, FDA referred seven cases to OIG that primarily involved employee fraud or conflict of interest. One of the seven cases involved personal threats to an FDA employee made by a nonemployee.

OIG has not been involved in any FDA drug diversion or counterfeit cases. The Inspector General noted that it may be time for FDA and his office to reexamine their handling of such investigations because it is unlikely that the problem of drug diversion will diminish. FDA officials told us that they have not involved OIG in their criminal investigations because FDA officials have always obtained assistance from the FBI and others when needed. FDA officials told us that they have not met with OIG officials to discuss FDA criminal investigations. However, FDA officials said that they are willing to meet with OIG to determine what resources and special investigative skills OIG could make available. We noted such an arrangement at USDA: the Food Safety and Inspection Service has a working agreement with the Office of the Inspector General about their mutual investigative and enforcement responsibilities concerning various USDA laws and regulations. The Service is responsible for ensuring that meat and poultry products are safe, wholesome, and properly labeled. When investigations disclose violations, various sanctions—such as seizure, detention of products, or criminal prosecution of violators—can be used. The Office of the Inspector General is responsible for supervising and coordinating the criminal investigative activities within USDA.

The agreement states that the Service will request that the USDA Office of the Inspector General investigate alleged violations that are particularly significant, complex, or sensitive. Such referrals will generally include matters that are likely to require serving and executing search and arrest warrants or using investigative grand juries. Under this agreement, about 20 cases per year are referred to the Office of the Inspector General. USDA officials told us that the cooperative arrangement has worked well over the years.

FDA Depends on Voluntary Reporting of Counterfeit and Diverted Drugs

FDA officials stated that because of the small number of counterfeit and diverted drug cases, resources are not directly assigned to identifying these drugs. Both the drug manufacturers and distributors regulated under the FD&C Act are generally not involved in counterfeiting and diverting drugs, according to these officials; therefore, FDA drug inspections, for the most part, will not identify persons involved in such activities. To be alert to possible counterfeit or diverted drugs, FDA depends on voluntary reporting and seeks information from health professionals, pharmacists, manufacturers, consumers, and others. FDA prioritizes the reports based on the seriousness of the problem and assigns them for follow-up by FDA district offices.

Through FDA's Drug Product Problem Reporting Program, FDA alerts pharmacists and health care facilities to its concern about counterfeit and diverted drugs. This program is jointly sponsored by FDA, the U.S. Pharmacopeial Convention, 50 state pharmaceutical associations, and other state and national organizations in various health care areas. The U.S. Pharmacopeial advises health care professionals and pharmacists on FDA's concerns about the risk to consumers in buying problem drugs, including those that have been counterfeited or diverted. The U.S. Pharmacopeial sends out about 70,000 preaddressed drug report pamphlets to pharmacists and health care facilities three times a year and operates a 24-hour toll free telephone hotline.

Reported problems are entered into an FDA computer system and also forwarded to the drug manufacturer or the company that labelled the drug or both for review and possible response. About 3,500 reports are received annually from U.S. Pharmacopeial, FDA officials stated. But officials could not remember many reports that dealt with drug counterfeiting and diversion. They noted, however, that in the past the FDA computer system did not specifically collect data on drug counterfeiting and diversion. A new computer system in the planning stage may collect such information, stated an FDA official. In addition, in September 1985, FDA appointed a coordinator for drug counterfeiting and diversion activities; he works with drug company security officers who investigate alleged drug counterfeiting and diversion activities.

FDA Has Investigated the Counterfeiting and Diversion of Drugs

Over the last 16 years, FDA has conducted 21 investigations of alleged counterfeiting and diversion of drugs. FDA made a determination in 18 of these investigations, which disclosed six cases of drug counterfeiting and three cases of drug diversion. No evidence of counterfeiting or diversion of drugs was found in the remaining nine cases. FDA had sought investigative assistance in some of the cases that resulted in numerous indictments and a criminal conviction.

On July 15, 1986, the FDA Commissioner testified before the House Committee on Energy and Commerce, Subcommittee on Oversight and Investigations, about FDA's investigations of counterfeit and diverted drugs. FDA had been involved in five counterfeit drug cases over the past 15 years, according to the Commissioner. He summarized three of FDA's significant diverted drug cases, which did not disclose any evidence of adulteration or misbranding. Concerning the five counterfeit cases, two resulted in violators' being imprisoned or fined or both; indictments have been handed down in a third case, and a grand jury was requested for a fourth case. FDA's investigation of the remaining case continues.

In September 1985, FDA issued an import alert to its district offices to help assure that American drugs coming back into the country or foreign drugs falsely offered as American goods returned are not counterfeit, adulterated, or misbranded. The alert specifies the requirements for importation of drugs, including a "paper trail" of the drug since it was manufactured in the United States and a visual inspection by FDA personnel before the drug can be released. Through February 1987, 395 import entries (drugs) entered the United States as American goods returned.[1] One entry was found to have counterfeit labeling and, according to an FDA official, it was seized. FDA's investigation is still ongoing.

In addition to the five counterfeit drug cases discussed by the Commissioner, we identified FDA efforts involving one other counterfeit case. In 1981, FDA learned from a drug manufacturer that approximately 1 million expired ampicillin capsules were stolen from its warehouse facility. Information obtained by FDA showed that an employee of the manufacturer and a pharmacist stole the capsules, bottled them under another manufacturer's name, and sold them using counterfeit labels. In April 1984, the employee pleaded guilty to three misdemeanor counts of shipping misbranded drugs in interstate commerce; he was sentenced to 500 hours of community service and 5 years' probation and also fined $2,000. In addition, the pharmacist pleaded guilty to two misdemeanors for shipping misbranded drugs in interstate commerce; he was sentenced to 300 hours of community service and 3 years' probation and also fined $2,000. This investigation was overlooked, FDA officials stated, when the Commissioner's testimony was prepared.

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[1] An entry is a documented offer for importation of goods into the United States.

We also identified 12 FDA diverted drug cases, in addition to the 3 cases discussed by the Commissioner. FDA, in 1985, began a joint investigation with the FBI that uncovered the diverting of counterfeit anabolic steroids and other drugs used to enhance athletic performance. An FDA official reported that underground distributors were recommending that athletes (1) take doses of these drugs that were many times higher than medically accepted and (2) use these drugs in various combinations, the dangers of which were unknown. In some cases, drugs for animals were promoted and sold through underground channels to enhance athletic performance. FDA's initial investigations revealed a network of underground distributors; in order to obtain evidence on the operations and the firms involved, FDA sought assistance from the Department of Justice and the FBI.

In May 1985, FDA and the FBI seized about $2 million worth of the prescription drugs in six states. A year later, the Department of Justice announced a nationwide investigation into the manufacture and distribution of steroids and other drugs. According to FDA, as of July 1987, 23 defendants had been convicted. The investigation continues, and more indictments are expected.

In addition, since February 1986, consumers, pharmacists, and State Boards of Pharmacies have reported 11 alleged diverted drug cases, according to FDA officials. The reports are forwarded by FDA headquarters to the appropriate FDA district office for follow-up with the drug manufacturer or persons making the report. FDA has completed its investigation of 8 of the 11 cases; work is still under way on the remaining 3 cases. In two of the completed cases, FDA officials stated, FDA determined that drugs had been diverted. In one case state officials seized and destroyed the drugs. No persons were prosecuted. In the other case, the person suspected of diverting drugs went out of business and disappeared.

In the remaining six completed cases, FDA did not find evidence that drugs were being diverted. FDA follow-up efforts included undercover purchases of drugs at a pharmacy suspected of distributing samples, inspection of a drug manufacturer, and interviews with persons making the reports. In two of these cases, FDA and State Boards of Pharmacies worked together and had drugs destroyed or voluntarily recalled because they were either outdated or in violation of the FD&C Act; that is, a drug wholesaler distributed drugs that were under FDA's detention.

FDA Hires and Trains Consumer Safety Inspectors and Officers

To verify that FDA-regulated products are in compliance with requirements of the FD&C Act, FDA hires and trains consumer safety inspectors and officers to do inspections, sample collections, and special investigations. They enforce laws and regulations to protect consumers from foods, drugs, cosmetics, and medical devices that are impure, unwholesome, ineffective, improperly labeled, or dangerous. FDA does not hire or train its personnel, however, to become criminal investigators. FDA's Director of Field Investigations told us that FDA assigns its more experienced consumer safety officers to lead special investigations of counterfeit and diverted drug cases and sometimes assigns consumer safety inspectors to provide assistance. As of June 1987, FDA had approximately 108 inspectors and 783 officers located in its 21 district offices.

The Office of Personnel Management's minimum standard for FDA inspectors and officers requires a knowledge of basic science. FDA inspectors must have 12 semester hours in various sciences in order to do such tasks as collecting product samples, conducting inspections of manufacturers that do not require scientific evaluations, and following up on routine consumer complaints that do not present a serious hazard to public health or safety. FDA officers must have a total of 30 semester hours of college-level science in any of the following fields: biology, chemistry, engineering, epidemiology, food technology, home economics, nutrition, pharmacy, and physical sciences, as well as additional appropriate experience or education or both. These courses are necessary for officers to carry out their primary responsibilities, including planning and conducting inspections; following up on consumer complaints of (1) violations of the FD&C Act and (2) reported injuries and illnesses caused by FDA-regulated products; developing information to support initiating legal actions, such as criminal prosecutions; and advising industry, as well as state and local officials and consumers, on FDA's enforcement of regulations and policies.

On completion of an internal orientation program dealing with FDA's organization and mission, new FDA inspectors and officers enter an on-the-job 6-month training program. This program (1) integrates formal classroom instruction with field experiences to provide the fundamentals of FDA inspections and (2) covers such topics as the FD&C Act, sanitation measures for protecting the public's health, evidence development, and drug inspections.

Numerous other courses are available to inspectors and officers on a continuous basis as resources permit, according to the FDA training director within the Office of Regulatory Affairs. Related to FDA's primary responsibilities, the available courses are ones such as food microbiology and sanitation, import operations, drug manufacturing quality control, and medical devices. According to FDA officials, several courses provide some training related to criminal investigations, such as

- Basic Food and Drug Law and Evidence Development: This is a 2-week course, initially developed in fiscal year 1984, that provides 1 week of training on the FDA food and drug laws and 1 week of evidence development. According to an FDA division director, approximately 90 percent of FDA inspectors and officers have taken the course; in the future, this course will be required for all inspectors and officers as they are hired.
- Criminal Investigations Training: This is a joint FDA/FBI course, held in 1987 because FDA was getting many drug-tampering cases. This 1-week course, given once to date, includes discussions on legal procedures that frequently arise out of criminal investigations, such as searches, grand jury proceedings, and the admissability of evidence. Also discussed were techniques on evidence development, such as handling informants, surveillance activity, and witness preparation. Selected consumer safety officers at or above the GS-11 level attended this course. In the future, FDA officials plan to (1) provide this training for consumer safety inspectors and (2) develop an in-house training course patterned after this course.
- Drug Diversion and Counterfeiting: This is a 2-day training course, held in January 1986. Corporate officials from various drug firms spoke to FDA program directors, compliance officers, and supervisory consumer safety officers about the methods used by drug counterfeiters and diverters. The objectives of the course are to exchange ideas and explore cooperative efforts between FDA and the drug industry to protect the quality of the nation's drug-supply system.

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OIG's Office of Investigations is responsible for investigating fraud and abuse activities within HHS. As a result, it seeks people with investigative skills to fill HHS criminal investigator positions and trains them to conduct criminal investigations. The Office's investigative staff is located in Washington, D.C., and in 47 field and sub-offices throughout the United States; the staff consists of 261 criminal investigators and 149 professional and support personnel, such as paralegal specialists and program analysts.

The Office of Personnel Management qualifications standards, followed by OIG, specify that criminal investigators have (1) a primary knowledge of investigative techniques and (2) a knowledge of the laws of evidence, the rules of criminal procedure, court decisions concerning the admissibility of evidence, constitutional rights, search and seizure techniques, and the availability and use of modern detection devices and laboratory services.

In addition, the standard requires that criminal investigators be skillful in such activities as maintaining surveillances, doing undercover work, making arrests, and taking part in raids. Criminal investigators must also be able to follow leads indicating that a crime will be committed rather than begin an investigation after a crime has been committed. Prior investigative experience or the successful completion of study at an accredited university or college helps applicants qualify as HHS criminal investigators. OIG seeks applicants with college degrees in areas such as accounting and criminal justice, according to an OIG official.

OIG criminal investigators receive training, both internal and external, in various laws of HHS and other federal agencies, surveillance and interviewing techniques, report writing, and several HHS program matters such as social security and health care. All OIG criminal investigators must complete an 8-week basic Criminal Investigator Training Program, sponsored by the Federal Law Enforcement Training Center in Glynco, Georgia. This program gives instruction in the skills necessary to carry out criminal investigations. The primary objective, according to course material, is to train law enforcement officers through classroom lectures and practical exercises in which students participate in law enforcement scenarios. Specialized topics in the program include counterfeiting, crime scene investigation, surveillance, search and seizure, detention and arrest, federal court procedures, and firearms safety rules and regulations.

Although there is no formal timetable for follow-up training, an OIG official said, criminal investigators will usually begin receiving it within 12 to 18 months after completing the basic training. Investigators can take other programs at the Center as part of their training, according to OIG officials, such as a 2-week Inspector General Follow-On Basic Training

Program or programs on white-collar crime and advanced law-enforcement photography.

In addition to OIG's specialized training for criminal investigators, an official stated, it has special equipment for conducting criminal investigations, such as 35mm cameras and lenses, video tape cameras and lenses for surveillance purposes, miniature radio and tape-recording equipment for electronic surveillance, and devices for obtaining telephone numbers dialed from telephone lines.

According to the Inspector General, FDA criminal investigations can best be performed by OIG because it routinely conducts such investigations; OIG has sufficient resources to carry out FDA criminal investigations of counterfeit and diverted drugs. He said that investigators work with U.S. attorneys on a regular basis, which gives them an advantage over other investigators, who only occasionally deal with the attorneys. For example, OIG's efforts resulted in 1,065 successful prosecutions and 412 administrative sanctions in fiscal year 1986.[3]

OIG investigators are trained not only in public health laws, the Inspector General added, but also in criminal laws and procedures. In addition, OIG and the FBI have a memorandum of understanding about their specific roles and responsibilities in referring and conducting criminal investigations involving HHS programs and operations. According to the memorandum, OIG will refer to the FBI criminal matters that require resources or expertise not available within OIG. It also states that the FBI's primary role is to investigate allegations of bribery and corruption involving U.S. employees. In addition, the FBI will provide assistance to OIG based on the availability of resources.

Conclusions

Although violators of the FD&C Act are subject to criminal penalties, FDA's primary responsibility is not to conduct criminal investigations. FDA has properly focused its resources on conducting inspections of regulated manufacturers and products to help ensure that products are not adulterated or misbranded. Since FDA's primary responsibility is to protect the public health, FDA consumer safety inspectors and officers need a scientific background and training to equip them with the necessary skills for carrying out the various FDA program responsibilities.

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[3] Under administrative sanctions, people are either barred from participation in HHS programs or fined or both.

FDA has recognized that there are times when it must seek specialized skills of other federal and state agencies to carry out criminal investigations. However, the HHS Inspector General has not been involved in FDA criminal investigations. Because the proposed legislation (see p. 9) would amend the FDAC Act by adding a number of prohibited activities that could subject persons and firms to criminal sanctions, it is likely that FDA's involvement in criminal investigations could increase. But FDA should not hire criminal investigators or train its consumer safety inspectors and officers to meet the Office of Personnel Management's criminal investigator qualification standards, regardless of whether the proposed legislation is enacted.

Rather, FDA should seek assistance from OIG because it has trained criminal investigators and believes it can carry out additional investigations within its current resources. In our view, OIG should be involved in investigating the criminal aspects of FDA cases. This would allow FDA's consumer safety inspectors and officers to continue to focus their attention on matters related to protecting the public's health.

Recommendation to the Secretary of HHS

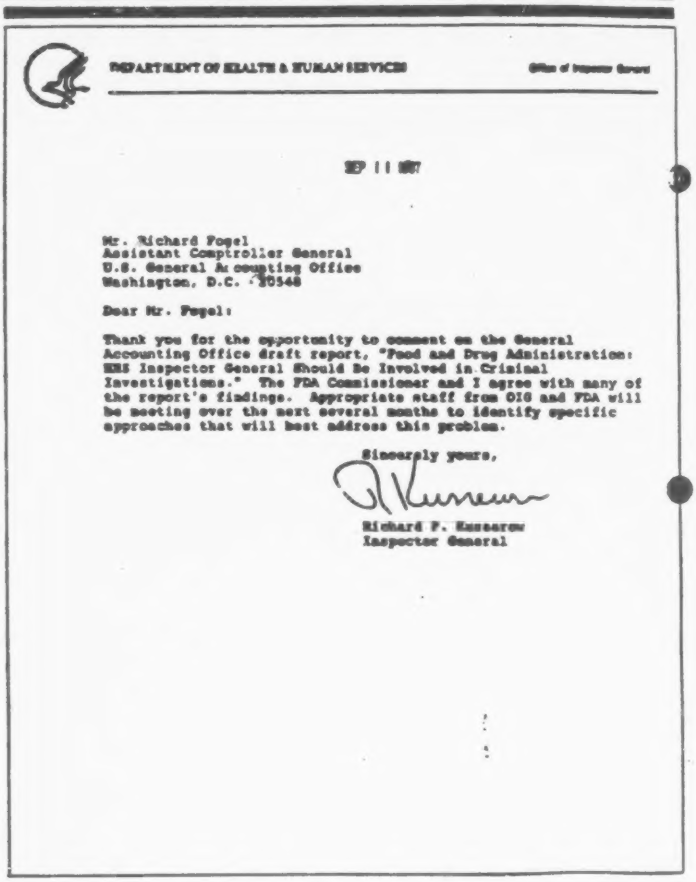
We recommend that the HHS Secretary direct the FDA Commissioner and the HHS Inspector General to develop and implement a plan for involving the Inspector General in FDA criminal investigations of its regulatory programs. Such a plan should identify the types of FDA investigations that will be referred to the Inspector General, when such referrals should be made, and the specific responsibilities of FDA and the Inspector General in carrying out criminal investigations.

Agency Comments

In a letter dated September 11, 1987, the HHS Inspector General stated that he and the FDA Commissioner agree with many of the report's findings, and appropriate FDA and OIG staff will meet over the next several months to identify specific approaches to address our recommendation.

Appendix I

Comments From the Department of Health and Human Services



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

SEP 11 1987

Mr. Richard Fogel
Assistant Comptroller General
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Fogel:

Thank you for the opportunity to comment on the General Accounting Office draft report, "Food and Drug Administration: HHS Inspector General Should Be Involved in Criminal Investigations." The FDA Commissioner and I agree with many of the report's findings. Appropriate staff from OIG and FDA will be meeting over the next several months to identify specific approaches that will best address this problem.

Sincerely yours,

Richard P. Kusserow
Inspector General

*U.S. G.P.O. 1987. 201-760:60154

Attachment 3

Joint Statement of Policy with Regard to Coordination Between Food and Drug Administration and Office of Inspector General

This statement sets out the joint policy of the Office of Inspector General (OIG) and the Food and Drug Administration (FDA) in establishing and implementing cooperative investigative efforts. We believe that our ability to accomplish our statutory missions will be greatly enhanced by cooperative activities which make the most effective and efficient use of the strengths and skills of both organizations.

FDA statement of responsibility: Administering the enforcement and regulatory provisions of the Federal Food, Drug and Cosmetic Act, including the investigation of alleged violations of the Act and of other federal laws arising within the Agency's jurisdiction. The FDA has a large staff of scientists, doctors, investigators, and other professionals experienced in administering the Agency's programs and investigating apparent violations.

OIG statement of responsibility: Supervising, coordinating and providing direction for investigations relating to the independent oversight of all the Department of Health and Human Services (HHS) programs and operations. The OIG's Office of Investigations is staffed by professionally qualified criminal investigators to meet its statutory responsibility. They are responsible for all departmental criminal investigations conducted under (42 U.S.C. 3523(a)(1)) and are empowered with special enforcement authorities, including issuing law enforcement subpoenas for records and taking statements under oath.

The two organizations have concurrent areas of interest which may lead to both having cause to investigate the same persons. This statement specifies areas of responsibility so as to avoid unnecessary duplication and to further our mutual goal of maximizing our efficiency by effective cooperation. As an initial step, OIG and FDA personnel in each region will immediately conduct discussions to establish a working arrangement to assure that evidence of significant violations of law within the jurisdiction of each organization will be promptly brought to the attention of each organization. In matters where both the FDA and the OIG share investigative responsibilities, each will keep the other fully informed of the status of their investigation and assist each other in any way practicable to the extent permitted by law. Cases may be investigated jointly where the respective regional officials agree that to do so would be in the best interest of the Department. After a referral for investigation has been made, each agency will advise the other of its intentions, if any, to seek the filing of charges by the appropriate U.S. Attorney.

In addition, we have agreed to coordinate investigative activities in the following specific areas:

A. Organized Crime - The FDA will notify OI of evidence of organized crime involvement in cases developed by the FDA. Generally, OI will be the lead investigating agency in subsequent investigations.

B. Bribery of FDA Officials - The FDA will refer all allegations of bribery to OI. The FDA will cooperate, as feasible, and to the extent necessary, in the subsequent investigation.

C. Fraud, Waste and Abuse in Department of Health and Human Services (HHS) Programs - When FDA discovers evidence of fraud, waste or abuse in departmental programs, including those programs which involve FDA regulated products, such as the reimbursement under Medicare for use of dialysis machines, it will refer such information to OI.

D. Grants and Contracts - The FDA will refer all allegations of fraud in HHS grants and contracts to OI. The FDA will cooperate, as feasible and to the extent necessary, in the subsequent investigation.

E. Investigations of Clinical Investigators - When FDA discovers evidence of fraud in the reporting of research by clinical investigators to their sponsors, and ultimately to FDA, the OI will be notified. Subsequent investigations will be conducted jointly, where appropriate, to avoid duplication of investigative efforts. Coordination is particularly important where the investigator is also a medical practitioner/provider.

F. Pre-Employment Security Checks - The OI will cooperate with FDA in conducting pre-employment security checks on prospective FDA employees.

G. FDA Employee Misconduct - The OI and FDA will continue to maintain their cooperative relationship relative to employee misconduct.

H. Drug Diversion and Counterfeiting - Allegations of drug diversion or counterfeiting will normally be discussed immediately by appropriate field OI and FDA representatives. (Cooperation is especially important in light of the new Prescription Drug Marketing Act and the pharmaceutical provisions of the Medicare Reform Bill). Subsequent investigations will be conducted jointly, where appropriate, to avoid duplication of investigation efforts.

I. Violations of the National Organ Transplant Act - FDA will refer all allegations of violations of this law to OIG. The FDA will cooperate, as feasible and to the extent necessary, in the subsequent investigation.

J. False Claims - The FDA will refer all allegations of fraud and false claims against agencies and programs of the Department to OIG. The FDA will cooperate, as feasible and to the extent necessary, in the subsequent investigation.

Neither agency intends that the above sets out the exclusive areas of cooperation. We expect our respective regional employees to coordinate activities whenever it is in the best interest of the Department to do so.

In order to assure the most expeditious implementation of this policy statement, we have each named an individual to act as liaison, the Deputy Assistant Inspector General for Criminal Investigations for the OIG, and the Director, Office of Regional Operations for the FDA. Implementation of these cooperative activities will be accomplished through the Office of Investigations regional offices and the FDA regional and district offices. To the extent possible, all information exchanges, agreements concerning mutual inspectional activities ,lead organization and the like, will be determined between the local OIG and the FDA representatives. In all cases, a record of referral will be made and forwarded to the respective liaison officers. Liaison officers will meet on an as needed basis, but no less than twice per year (spring and fall) to assure this agreement is functioning properly.

Inspector General

Date 1/13/89

Commissioner of Food and Drug Administration

Date 1/12/89

DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of the Secretary

Washington, D.C. 20201

Attachment C

JUL 20 1989

TO: The Secretary
Through: US ____
COS ____
ES ____

FROM: General Counsel
Inspector General
Commissioner of Food and Drugs

SUBJECT: Delegation of Criminal Investigative Responsibilities and Authorities Under the Federal Food, Drug and Cosmetic Act

Action Requested By: 7/21/89

ISSUE

Whether to delegate to the Office of Inspector General (OIG) authority to conduct investigations of felony violations of the Food, Drug and Cosmetic Act.

DISCUSSION

For some time, staff of the OIG, the Food and Drug Administration (FDA), and the Office of General Counsel have held discussions on the proper division of responsibility between the OIG and FDA with regard to violations of the Food, Drug and Cosmetic Act. We have ultimately concluded that the best solution to the problem of overlapping investigative responsibilities is to delegate the responsibility for FDA felony investigations, along with the corresponding FDA law enforcement authorities, to the OIG. All other enforcement responsibilities under the Act will remain with the FDA.

Since there are ongoing investigations that raise the issue of the proper division of responsibility for investigating violations of the Food, Drug and Cosmetic Act, we request that you sign this delegation as soon as possible.

RECOMMENDATION

It is recommended that you sign the attached delegation.

DECISION

Approved__________ Disapproved __________ Date ________

Michael Astrue

Michael J. Astrue

Richard P. Kusserow

Frank E Young

Frank E. Young, M.D.

Attachment:
Tab A - Delegation of Authority

THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

JUL 24 1989

IG ✓
DIG ✓
AIG-A
AIG-I ✓
AIG-M ✓
ADM ✓
✓OGC ✓
EX SEC ✓
DATE SENT 7/24/8

TO: Inspector General

FROM: The Secretary

SUBJECT: Delegation of Criminal Investigative Responsibilities and Authorities under the Federal Food, Drug and Cosmetic Act

Under the authority vested in me under section 702(a) of the Federal Food, Drug and Cosmetic Act, and consistent with 5 U.S.C. App. 3 section 9(a)(2), which authorizes the transfer to the Inspector General of such functions, powers, or duties as the Secretary determines are properly related to the functions of the Office of Inspector General, I hereby delegate to you, with authority to redelegate and to authorize further redelegation, the responsibility for conducting investigations of criminal violations of the Federal Food, Drug and Cosmetic Act for which the penalty is a felony. This delegation does not include any program inspection or examination authority, nor does it include responsibility for any matter which is a program operating responsibility under 5 U.S.C. App. 3 section 9(a). This delegation also does not include matters which are not properly related to the functions of the Office of Inspector General and should remain a function of the Food and Drug Administration.

For purposes of carrying out these responsibilities, I hereby designate employees of the Office of Investigations who are classified in the GS/GM-1811 criminal investigator series as employees of the Department authorized to conduct criminal investigations for purposes of section 702(e) of the Federal Food, Drug and Cosmetic Act, and authorize such employees to exercise the law enforcement authorities specified under this section as directed by the Inspector General or his designee.

To the extent that any prior delegation is inconsistent with this delegation, that prior delegation is hereby superseded. However, to the extent that any investigation has been undertaken pursuant to prior delegations of authority pertaining to investigations under the Federal Food, Drug and Cosmetic Act, or pursuant to the Joint Statement of Policy of the Inspector General and the Commissioner of the Food and Drug Administration (January 18, 1989), those actions are hereby ratified.

This delegation is effective immediately.

Louis W. Sullivan, M.D.

March 7, 1990 at 8:52 a.m.

Attachment D

File_Number	Source	Allegation	Open	Close	Status	Location
W-89-00168-3	Drug Company	Acceptace of Gratuities from Regulated Industry/Perjury	89/10/06		Active Investigation-GJ	U.S. Atty.
W-90-00009-3	Spin-off from Another Investigation	Acceptance of Gratuities	90/01/02		Active Investigation;GJ	U.S. Atty.
W-89-00017-3	U.S. Congress	Acceptance of Gratuities from Regulated Industry	89/02/06	89/05/30	Referred for Adm. Action	
W-88-00041-3	Food and Drug Administration	Attempted Bribery of FDA Officials	88/02/04		Being Worked under W-88-00110	U.S. Atty.
2-89-00620-3	Food and Drug Administration	Bribery	89/08/04	89/09/14	Allegation Unsubstantiated	
2-89-00778-3	Food and Drug Administration	Bribery	89/08/30	89/09/05	Allegation Unsubstantiated	
3-88-00734-4	Food and Drug Administration	Bribery	88/10/27	89/04/18	Allegations unsubstantiated	
4-89-00607-3	Transcool Services, Inc.	Bribery	89/07/24	89/10/26	Allegations Unsubstantiated	
6-90-00004-3	U.S. Congress	Bribery	89/12/08		To Be Closed - Complaint	OI
8-89-00774-3	Citizen Complaint	Bribery	89/12/28	90/01/26	Referred to DOJ	OCL/DOJ
9-89-06030-3	Food and Drug Administration	Bribery	89/10/17		To Be Closed	OI
3-86-00100-0	Office of Government Ethics	Conflict of Interest	88/06/07	88/08/11	Prosecution Declined	
6-89-00787-3	Public Health Service	Conflict of Interest	89/11/06	89/11/06	U.S.A. declined prosecution	
Unnumbered	Public Health Service	Conflict of Interest	90/01/18	90/01/18	Referred to DOJ - Complaint	OCL/DOJ
Unnumbered	Anonymous	Conflict of Interest	90/01/23	90/01/30	Referred to DOJ - Complaint	OCL/DOJ
W-89-00060-3	Food and Drug Administration	Conflict of Interest	89/06/09	90/01/10	Referred to DOJ	OCL/DOJ
W-89-00077-3	U.S. Congress	Conflict of Interest	89/07/05	89/12/01	Allegations Unsubstantiated	
W-88-00046-3	Food and Drug Administration	Contractor Fraud	88/02/29		Referred to Civil Div. - DOJ	DOJ
W-88-00074-3	Industry	Contractor Fraud	88/04/21		To Be Closed	OI
W-88-00110-3	U.S. Congress	Corruption in Generic Drug Approval Process/Illegal Gratuitie	88/07/01		On-going GJ; 0 Convictions	U.S. Atty.
2-89-00304-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/05/02	90/01/23	Referred to DOJ	OCL/DOJ
2-89-00305-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/05/02	90/01/22	Referred to DOJ	OCL/DOJ
2-89-00306-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/04/21	90/01/23	Referred to DOJ	OCL/DOJ
2-89-00307-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/04/17	90/01/18	Referred to DOJ	OCL/DOJ
2-89-00308-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/04/21	90/01/26	Referred to DOJ	OCL/DOJ
2-89-00309-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/04/21	90/01/26	Referred to DOJ	OCL/DOJ
2-89-00310-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/04/21	90/01/26	Referred to DOJ	OCL/DOJ
2-89-00512-3	Confidential Informant	Distribution of Counterfeit Drugs	89/09/05	90/01/26	To Be Referred to OCL/DOJ	U.S. Atty
2-89-00647-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/07/31	90/01/26	Evidence to Joint Agency	JointAgncy
2-89-00771-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/09/11		To Be Referred to OCL/DOJ	OI
2-90-00014-3	Wyeth Lab	Distribution of Counterfeit Drugs	90/01/10	90/01/30	Evidence to Joint Agency	JointAgncy
3-89-00614-3	Federal Law Enforcement	Distribution of Counterfeit Drugs	89/11/22	90/02/02	Evidence to Joint Agency	JointAgncy
5-89-00604-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/08/17	90/01/31	Referred to DOJ	OCL/DOJ
6-89-00565-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/07/24	89/10/23	Allegations Unsubstantiated	
9-88-01240-3	Food and Drug Administration	Distribution of Counterfeit Drugs	89/04/21	90/02/05	Evidence to Joint Agency	JointAgncy

File_Number	Source	Allegation	Open	Close	Status	Location
9-89-04679-3	Food and Drug Administration	Distribution of Counterfeit Drugs/Labels	89/08/18	90/02/07	To be referred to DOJ	U.S. Atty.
5-89-00560-3	Private Citizen	Distribution of Drugs without FDA Approval	89/08/09		Referred to DOJ	OCL/DOJ
2-89-00168-3	Food and Drug Administration	Drug Diversion	89/01/27	90/01/12	Allegations Unsubstantiated	
3-89-00615-3	Federal Law Enforcement	Drug Diversion	89/11/22	90/02/02	Evidence to Joint Agency	JointAgncy
9-89-07250-3	Drug Enforcement Administration	Drug Diversion	89/09/01	90/01/10	Referred to DOJ	OCL/DOJ
5-89-00402-3	Food and Drug Administration	Embezzlement of Imprest Fund	89/06/08		Indictment on 1/23/90 .	U.S. Atty.
6-89-00610-3	Food and Drug Administration	Embezzlement of Imprest Fund	89/11/30	90/01/25	Conviction	
U-88-00132-3	Food and Drug Administration	Embezzlement of Imprest Funds	88/10/03	88/05/08	Referred to FDA	FDA
2-89-00546-3	Food and Drug Administration	Emezzlement of Imprest Fund	89/09/06	89/09/06	Subj. could not be Identified	
2-88-00474-3	Food and Drug Administration	Employee Misconduct	88/07/02	88/07/07	Referred to FDA for action	
U-89-00150-3	U.S. Congress	Employee Misconduct; Impeding Investigations	89/07/07	89/10/19	Closed; Referred-admin action	
5-89-00057-3	Citizen Complaint	Failure to Establish and Maintain Records Required by FFDCA	89/02/15	90/01/25	FDA portion complete-no pros.	Locals
2-89-00743-3	Food and Drug Administration	Failure to Report Adverse Effects of a Drug to FDA	89/08/25		Evidence to Joint Agency	JointAgncy
2-89-00750-3	Confidential Informant	Failure to Report Adverse Effects of a Drug to the FDA	89/11/07	90/01/18	Referred to DOJ	OCL/DOJ
5-89-00651-3	Food and Drug Administration	Failure to Report Adverse Effects of Investigational New Drug	89/09/27	90/01/05	Referred to DOJ	OCL/DOJ
0-89-00636-3	Confidential Informant	Failure to Report Adverse Effects of Investigational New Drug	89/09/06	90/01/31	Referred to DOJ	OCL/DOJ
5-89-00627-3	Attorney-at-Law	Failure to Report Adverse Effects of Medical Device to FDA	89/11/03	90/01/05	Referred to DOJ	OCL/DOJ
5-89-00587-3	Former Employee of Subject	False Certification of Medical Device/Medicare Fraud	89/09/06	90/01/26	FDA aspects referred to DOJ	OCL/DOJ
5-89-00381-3	Local Police Department	False Scripts Used to Obtain Drugs	89/05/30	90/02/19	No FDA Violation	JointAgncy
2-89-00708-3	Food and Drug Administration	False Statements to FDA in Reports	89/11/21	90/01/29	Evidence to Joint Agency	JointAgncy
U-90-00016-3	Food and Drug Administration	Favoritism by FDA Employees	90/01/08		Complaint	OI
U-89-00086-3	FDA	Favoritism;Conflict of Interest	89/05/23	90/01/10	Allegations Unsubstantiated	
9-89-04116-9	Food and Drug Administration	Forgery of Document from FDA that Approved DME Items	90/01/23	90/02/12	Referred to DOJ - Complaint	OCL/DOJ
U-89-00195-3	Spinoff from another investigation	Fraudulent ANDA	89/10/06		Active Investigation-GJ	U.S. Atty.
Unnumbered	OIG Audit	Fraudulent New Drug Application			Under Review - Complaint	OI
Unnumbered	OIG Audit	Fraudulent New Drug Application			Under Review - Complaint	OI
Unnumbered	OIG Audit	Fraudulent New Drug Application			Under Review - Complaint	OI
Unnumbered	OIG Audit	Fraudulent New Drug Application			Under Review - Complaint	OI
2-89-00736-3	Food and Drug Administration	Generic Drug - Assistance to the Food and Drug Administration	89/08/30		Evidence to Joint Agency	JointAgncy
1-89-00184-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/08/30	89/08/30	Allegation Unsubstantiated	
1-89-00185-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/08/30	89/08/30	Allegation Unsubstantiated	
2-89-00757-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/08/30	90/01/12	UFO in Working Investigation	
2-89-00764-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/08/31	89/09/06	Allegations Unsubstantiated	
2-89-00765-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/08/30	89/11/15	Allegations Unsubstantiated	
2-89-00767-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/08/30	89/12/11	Allegations Unsubstantiated	
2-89-00775-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/09/05	89/09/06	Allegation Unsubstantiated	

File_Number	Source	Allegation	Open	Close	Status	Location
2-89-00776-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/09/05	89/09/06	Allegation Unsubstantiated	
2-89-00777-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/09/05	89/09/06	Allegation Unsubstantiated	
2-89-00781-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/09/07	89/09/08	Allegation Unsubstantiated	
2-89-00782-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/09/07	89/09/08	Allegation Unsubstantiated	
2-89-00786-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/09/12	89/11/09	Allegations Unsubstantiated	
5-89-00582-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/09/29	90/01/19	Allegations Unsubstantiated	
5-89-00586-3	Food and Drug Administration	Generic Drug-Assistance to Food and Drug Administration	89/08/31	90/01/31	Allegations Unsubstantiated	
5-88-00110-4	U.S. Attorney	Illegal Dispensing of a Controlled Substance	88/06/27	89/05/02	Prosecution Declined	
U-88-00094-3	Anonymous	Illegal Use of Computer Software	88/05/16	88/08/23	No Criminal Violation	
9-89-07163-3	Food and Drug Administration	Importation of Unapproved Drugs	89/06/20	90/02/01	Evidence to Joint Agency	JointAgncy
U-88-00139-3	Generic Drug Firm	Improper Disclosure of Proprietary Information	88/10/20	89/07/27	Allegation Unsubstantiated	
9-89-07301-3	Food and Drug Administration	Introducing into Interstate Commerce Unapproved Drugs	89/11/06	90/01/10	Referred to DOJ	OCL/DOJ
N-89-00078-3	U.S. Congress	Irregularities in the Medical Device Approval Process	89/07/06	90/01/10	Referred to DOJ	OCL/DOJ
9-89-00174-3	Food and Drug Administration	Manufacturing and Interstate Transport of Drugs	89/05/19	89/11/16	Referred to DOJ	OCL/DOJ
5-88-00366-4	Federal Bureau of Investigation	Marketing of Non-FDA Approved Products	88/05/20	88/08/11	Prosecution Declined	
U-89-00176-3	Office of Special Counsel	Mismanagement in CVM; Conflict of Interest	89/10/24	90/01/10	Referred to DOJ	OCL/DOJ
3-88-00041-8	Office of Special Counsel, MSPB	Misuse of Authority; Falsification of Gov't Records	88/02/01	89/04/20	Closed	
8-89-00655-3	Food and Drug Administration	Misuse of FDA Grant Funds	89/10/10	90/02/09	No FDA Involvement	
8-88-10139-8	Food and Drug Administration	Misuse of Government Property	88/04/20	88/12/28	Administrative Action Taken	
U-89-00044-4	Food and Drug Administration	Overtime Abuse	89/01/10	89/07/20	Prosecution Declined	
U-88-00076-3	Anonymous	Overtime Fraud	88/04/21	88/12/07	Allegation Unsubtantiated	
Unnumbered	Food and Drug Administration	PDMA	90/02/13	90/02/13	Referred to DOJ	OCL/DOJ
Unnumbered	Food and Drug Administration	PDMA		90/02/13	Referred to DOJ	OCL/DOJ
Unnumbered	Food and Drug Administration	PDMA			To Be Referred to DOJ	OI
Unnumbered	U.S. Congress	PDMA - Dist of Diverted/Misbranded Chemicals for Drug Manufac	90/01/22	90/02/13	Referred to DOJ	OCL/DOJ
5-89-00128-3	Ohio State Board of Pharmacy	PDMA Illegal Distribution of Drug Samples	89/03/24	90/01/10	Referred to DOJ	OCL/DOJ
9-89-04689-3	Task Force	PDMA, Distribution of Drug Samples; Steroid Trafficking		90/01/23	Closed	
Unnumbered	U.S. Congress	PDMA, Diversion	90/01/10	90/01/23	Referred to DOJ - Complaint	OCL/DOJ
5-89-00294-3	Food and Drug Administration	PDMA, Drug Diversion	89/05/03	89/07/13	Allegation Unsubstantiated	
9-89-04627-3	Private Investigative Firm	PDMA, Illegal Distribution of Diverted Drugs	89/08/14	90/01/12	Referred to DOJ	OCL/DOJ
2-89-00651-3	U.S. Congress	PDMA, Illegal Distribution of Drug Samples	89/08/09		Evidence to Joint Agency	JointAgncy
2-89-00652-3	U.S. Congress	PDMA, Illegal Distribution of Drug Samples	89/08/09	90/01/31	Evidence to Joint Agency	JointAgncy
3-89-00268-3	Drug Enforcement Administration	PDMA, Illegal Distribution of Drug Samples	89/05/19	90/02/02	Evidence to Joint Agency	JointAgncy
3-89-00269-3	Federal Bureau of Investigation	PDMA, Illegal Distribution of Drug Samples	89/05/23	90/02/02	Evidence to Joint Agency	JointAgncy
3-89-00520-3	Food and Drug Administration	PDMA, Illegal Distribution of Drug Samples	89/11/17	90/02/02	Evidence to Joint Agency	JointAgncy
3-89-00625-3	Food and Drug Administration	PDMA, Illegal Distribution of Drug Samples	89/11/22	90/02/02	Evidence to Joint Agency	JointAgncy

File_Number	Source	Allegation	Open	Close	Status	Location
3-89-00686-3	Food and Drug Administration	PDMA, Illegal Distribution of Drug Samples	01/04/90	90/02/02	Evidence to Joint Agency	JointAgncy
3-90-00045-3	Spinoff	PDMA, Illegal Distribution of Drug Samples	90/01/25	90/02/02	Evidence to Joint Agency	JointAgncy
3-90-00046-3	Spinoff	PDMA, Illegal Distribution of Drug Samples	90/01/25	90/02/02	Evidence to Joint Agency	JointAgncy
3-90-00047-3	Spinoff	PDMA, Illegal Distribution of Drug Samples	90/01/25	90/02/02	Evidence to Joint Agency	JointAgncy
4-89-00132-4	U.S. Congress	PDMA, Illegal Distribution of Drug Samples	89/02/14	90/01/12	Referred to DOJ	OCL/DOJ
4-89-00460-3	Food and Drug Administration	PDMA, Illegal Distribution of Drug Samples	89/07/27	90/01/12	Referred to DOJ	OCL/DOJ
5-89-00202-3	Drug Enforcement Agency	PDMA, Illegal Distribution of Drug Samples	89/06/24	90/01/26	Under U.S. Attorney Direction	U.S. Atty.
6-89-00061-3	Texas Medicaid Fraud Control Unit	PDMA, Illegal Distribution of Drug Samples	89/01/13		Pre-Trial Diversion Expected	U.S. Atty.
6-90-00014-3	Former Employee of Subject	PDMA, Illegal Distribution of Drug Samples	90/01/08	90/01/18	Referred to DOJ	OCL/DOJ
9-89-07167-3	Oregon Board of Pharmacy	PDMA, Illegal Distribution of Drug Samples	89/07/12	90/02/01	To Be Referred to DOJ	U.S. Atty.
9-89-07314-3	G.D. Searle to FDA	PDMA, Illegal Distribution of Drug Samples	89/08/09	89/08/09	Complaint	
9-89-07374-3	Spin-off from Another Investigation	PDMA, Illegal Distribution of Drug Samples	89/10/30		Evidence to Joint Agency	JointAgncy
2-89-00580-3	Food and Drug Administration	PDMA, Illegal Distribution of Outdated Drug Samples	89/09/29	90/01/19	Referred to DOJ	OCL/DOJ
3-89-00521-3	Food and Drug Administration	PDMA, Illegal Distribution of Sample Drugs	89/10/21	90/02/02	Evidence to Joint Agency	JointAgncy
2-89-00853-3	Glaxo, Inc.	PDMA, Illegal Distribution of Samples	89/09/14	89/09/25	Prosecution Declined	
Unnumbered	Food and Drug Administration	PDMA, Possible Drug Diversion from Boots Company	90/01/12		To Be Referred to DOJ	OI
Unnumbered	Food and Drug Administration	PDMA, Possible Drug Diversion from Glaxo, Inc.	90/01/12		To Be Referred to DOJ	OI
3-89-00670-3	Food and Drug Administration	PDMA, Resale of Drugs Designated for Hospital Use	89/12/12	90/01/12	Referred to DOJ	OCL/DOJ
2-89-00866-3	Food and Drug Administration	PDMA, Sale of Drug Samples	89/10/03	89/10/23	Allegation unsubstantiated	
W-89-00169-3	Food and Drug Administration	Procurement Fraud	89/10/10	90/01/10	Referred to DOJ	OCL/DOJ
2-89-00377-3	U.S. Customs	Product Tampering	90/01/11	90/01/29	Evidence to Joint Agency	JointAgncy
5-89-00387-3	News Media	Product Tampering	89/04/22	89/06/08	Allegation Unsubstantiated	
5-89-00628-3	Food and Drug Administration	Product Tampering	89/04/11	90/01/30	Closed	
Unnumbered	Anonymous	Receipt of Illegal Payments	90/01/12		Under Review - Complaint	OI
W-89-00083-3	U.S. Congress	Release of Proprietary Data to the Government Accounting Offi	89/07/03	89/09/12	Closed; Referred-admin action	
W-89-00122-3	Food and Drug Administration	Release of Proprietary Information	89/08/29	90/01/11	Referred to DOJ	OCL/DOJ
5-87-00127-9	Former Employee of Subject	Repackaging Oxygen Without FDA Approval; Medicare/Medicaid Fr	89/08/01		To Be Referred to DOJ	U.S. Atty.
5-89-00259-3	U.S. Fish and Wildlife Service	Sale of Injurious Products	89/05/09	90/02/15	Evidence to Joint Agency	JointAgncy
W-90-00020-3	Virginia State Police	Smuggling of Schedule IV Drugs Into the U.S.	89/10/02	90/01/29	To Be Referred to DOJ	
6-89-00522-3	Food and Drug Administration	Submission of False Information to FDA	89/06/28	89/10/03	Allegations Unsubstantiated	
2-89-00716-3	U.S. Attorney	Submission of False Information to FDA in Support of NDA	89/09/12		Evidence to Joint Agency	JointAgncy
W-89-00071-3	Spin-off from Another Investigation	Submission of False Information to FDA in Support of NDA	89/07/03		Under U.S. Attorney Direction	U.S. Atty.
W-89-00084-3	Spin-off from Another Investigation	Submission of False Information to FDA in Support of NDA	89/07/03		Active Investigation-GJ	U.S. Atty.
W-89-00115-3	Spin-off from Another Investigation	Submission of False Information to FDA in Support of NDA	89/08/20		Active Investigation-GJ	U.S. Atty.
W-89-00180-3	Spin-off from Another Investigation	Submission of False Information to FDA in Support of NDA	89/11/22		Active Investigation	U.S. Atty.
6-89-00578-3	Food and Drug Administration	Submission of False Information to the FDA in Support of NDA	89/08/03	90/01/29	To Be Referred to DOJ	U.S. Atty.

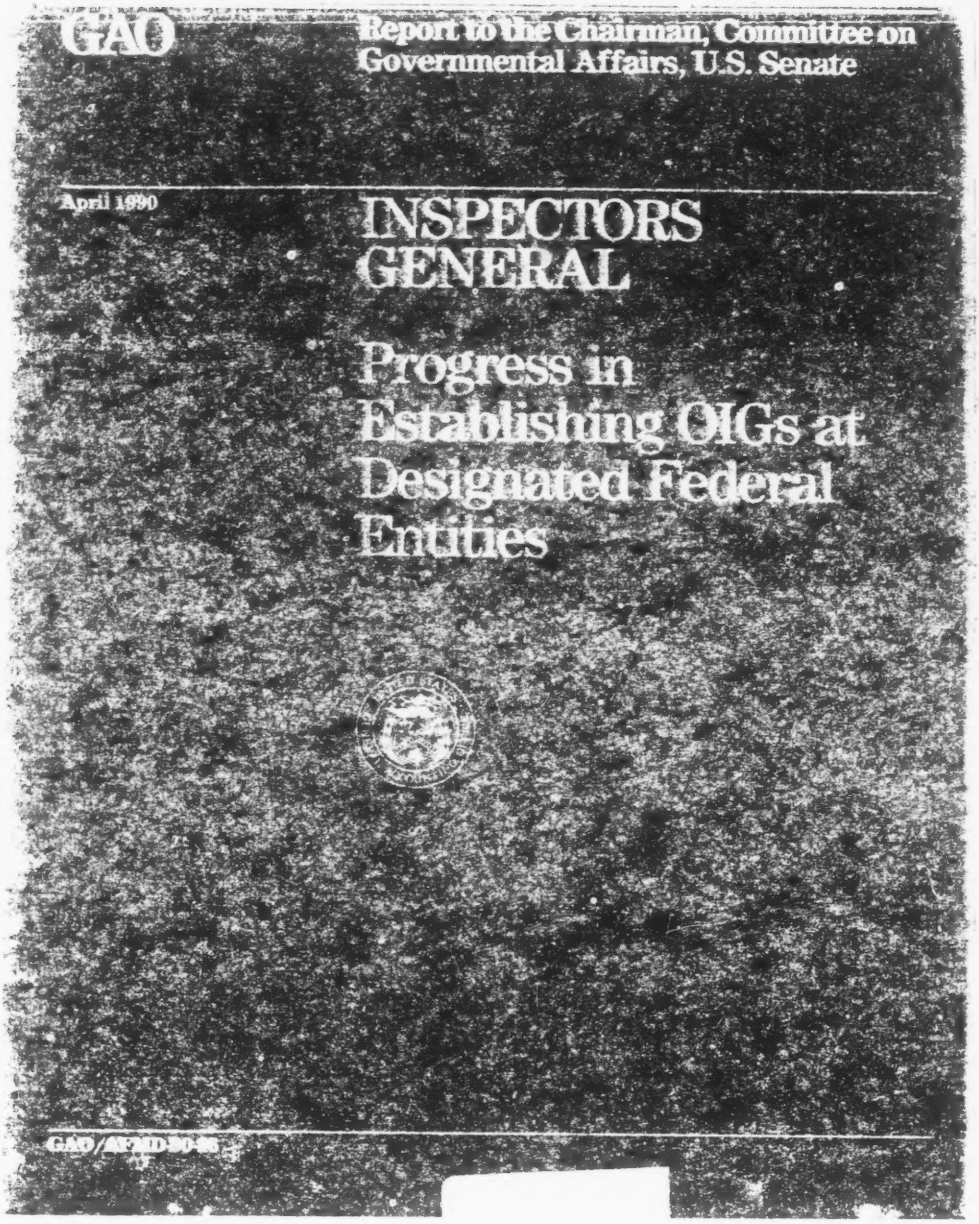
File_Number	Source	Allegation	Open	Close	Status	Location
9-90-00015-3	Food and Drug Administration	Submission of False Information to the FDA in Support of NDA	90/01/11	90/01/11	Closed - No Leads	
2-89-00595-3	Food and Drug Administration	Submission of False Inspection Reports	89/07/05		To Be Closed	OI
3-89-00649-9	Anonymous	Submission of False Statements to FDA/Medicare Fraud	89/11/28		Referred to DOJ	OCL/DOJ
Unnumbered	Food and Drug Administration	Theft of Drug Samples from Hoffman LaRoche, Inc.			To Be Referred to OCL/DOJ	OI
H-89-00057-4	Food and Drug Administration	Theft of Government Property		89/10/31	Allegations Unsubstantiated	
H-89-00187-3	Food and Drug Administration	Theft of Proprietary Information	89/10/24	90/01/12	Referred to DOJ	OCL/DOJ
2-89-00154-3	U.S. Attorney	Trafficking in Steroids	89/03/22	90/01/31	Evidence to Joint Agency	JointAgncy
2-89-00190-3	U.S. Customs Service	Trafficking in Steroids	89/04/21	93/02/06	Evidence to Joint Agency	JointAgncy
2-89-00311-3	Local Prosecutor's Office	Trafficking in Steroids	89/04/25	89/09/29	Closed	
2-89-00312-3	U.S. Customs Service	Trafficking in Steroids	89/05/04	90/01/31	Evidence to Joint Agency	JointAgncy
2-89-00340-3	Various	Trafficking in Steroids	89/04/19	90/02/02	Closed	
2-89-00357-3	U.S. Attorney	Trafficking in Steroids	89/05/26		Evidence to Joint Agency	JointAgncy
2-89-00359-3	Anonymous	Trafficking in Steroids	89/08/15		To Be Referred to DOJ	OI
2-89-00665-3	U.S. Customs	Trafficking in Steroids	89/08/04		Evidence to Joint Agency	JointAgncy
2-89-00740-3	U.S. Customs Service	Trafficking in Steroids	89/09/11	90/01/30	Evidence to Joint Agency	JointAgncy
2-89-00790-3	Food and Drug Administration	Trafficking in Steroids	89/09/14	90/01/31	Evidence to Joint Agency	JointAgncy
2-89-00852-3	Private Citizen	Trafficking in Steroids	89/09/14	90/01/10	Allegation Unsubstantiated	
2-89-00854-3	Florida State Dept HRS	Trafficking in Steroids	89/09/21	89/09/28	Prosecution Declined	
2-89-00871-3	Local Police Department	Trafficking in Steroids	90/01/05	90/01/31	Evidence to Joint Agency	JointAgncy
2-89-00932-3	Drug Enforcement Administration	Trafficking in Steroids	89/11/09	90/01/26	Evidence to Joint Agency	JointAgncy
2-89-00933-3	Drug Enforcement Administration	Trafficking in Steroids	89/11/09	90/01/26	Evidence to Joint Agency	JointAgncy
2-89-01067-3	Confidential Source	Trafficking in Steroids	90/01/12	90/01/31	Evidence to Joint Agency	JointAgncy
2-89-01077-3	City Prosecutor	Trafficking in Steroids	89/12/18		To Be Referred to OCL/DOJ	OI
2-89-01078-3	Food and Drug Administration	Trafficking in Steroids	90/11/24		To Be Referred to DOJ	OI
2-90-00003-3	Confidential Informant	Trafficking in Steroids	90/01/12	90/01/31	Evidence to Joint Agency	JointAgncy
2-90-00004-3	Confidential Informant	Trafficking in Steroids	90/01/12	90/01/31	Evidence to Joint Agency	JointAgncy
3-89-00320-3	Federal Bureau of Investigation	Trafficking in Steroids	89/06/27	90/01/20	Evidence to Joint Agency	JointAgncy
3-89-00360-3	U.S. Postal Inspection Service	Trafficking in Steroids	89/12/29	90/02/02	Closed - Unproductive	
3-89-00553-3	Private Citizen	Trafficking in Steroids	89/10/18	90/02/02	Evidence to Joint Agency	JointAgncy
5-88-00434-9	Spinoff	Trafficking in Steroids		89/11/14	Conviction	
5-88-00831-3	Anonymous	Trafficking in Steroids	88/09/28	90/01/26	Evidence to Joint Agency	JointAgncy
5-89-00056-4	City Solicitor	Trafficking in Steroids	88/12/14	89/08/09	Allegations Unsubstantiated	
5-89-00060-3	Drug Enforcement Agency	Trafficking in Steroids	89/01/03	89/07/27	Prosecution declined	DEA
5-89-0023[illegible]-3	Local Police Department	Trafficking in Steroids	89/05/15	89/10/06	Evidence to Joint Agency	JointAgncy
5-89-00283-3	Food and Drug Administration	Trafficking in Steroids	89/05/15		Evidence to Joint Agency	JointAgncy
5-89-00297-3	Ohio State Board of Pharmacy	Trafficking in Steroids	89/06/19	89/11/06	Convictions (2)	

File_Number	Source	Allegation	Open	Close	Status	Location
5-89-00361-3	Sheriff's Department	Trafficking in Steroids	89/06/20	89/11/08	Conviction	
5-89-00423-3	Food and Drug Administration	Trafficking in Steroids	89/04/10	89/06/19	Allegation Unsubstantiated	
5-89-00464-3	Columbus Ohio Police Department	Trafficking in Steroids	89/08/04	90/02/20	Closed - Prosecution Declined	
5-89-00608-3	Citizen Complaint	Trafficking in Steroids	89/08/29	90/02/05	Evidence to Joint Agency	JointAgncy
5-89-00625-3	State Police	Trafficking in Steroids	89/09/01		To Be Referred to OCL/DOJ	OI
5-89-00635-3	U.S. Customs	Trafficking in Steroids	89/09/13		Evidence to Joint Agency	JointAgncy
5-89-00636-3	News Media	Trafficking in Steroids	89/09/13		Evidence to Joint Agency	JointAgncy
5-89-00756-3	U.S. Postal Inspection Service	Trafficking in Steroids	89/11/09	90/02/05	Evidence to Joint Agency	JointAgncy
5-90-00016-3		Trafficking in Steroids		90/01/26	Closed	
6-89-00382-4	U.S. Customs Service	Trafficking in Steroids	89/08/29	90/02/05	Convictions (2)	
6-89-00796-3	Oklahoma City Police Department	Trafficking in Steroids	89/11/07	90/02/01	Closed	
8-89-00271-3	U.S. Customs Service	Trafficking in Steroids	89/04/27	89/08/29	Allegations Unsubstantiated	
8-89-00658-3	Colorado State Police	Trafficking in Steroids	89/10/10	90/01/25	Conviction	
8-89-00702-3	Brighton Colorado Police Department	Trafficking in Steroids	89/11/11	90/01/26	Referred to DOJ	OCL/DOJ
8-89-00715-3	Colorado State Police	Trafficking in Steroids	89/10/10	90/02/15	Conviction	
9-89-00416-3	Food and Drug Administration	Trafficking in Steroids	89/10/28		To Be Referred to DOJ	OI
9-89-07020-3	Orgeon Board of Pharmacy	Trafficking in Steroids	89/11/10		To Be Referred to DOJ	OI-Complnt
Unnumbered	Oregon Board of Pharmacy	Trafficking in Steroids			To Be Referred to DOJ	OI-Complnt
4-89-10012-3	Former Employee of FDA	Travel Fraud	89/08/04	90/01/19	Restitution Rec'vd from Subj	
H-89-00080-3	Food and Drug Administration	Travel Fraud	89/07/06		To Be Closed	OI
H-89-00140-3	Texas Department of Health	Unauthorized Release of Information	89/10/04	90/01/10	Referred to DOJ	OCL/DOJ
Unnumbered	Food and Drug Administration	Unauthorized Release of Inspection Report	90/02/08	90/03/02	Referred to DOJ	OCL/DOJ
H-89-00089-3	FDA	Unauthorized Release of Proprietary Information	89/06/30	89/09/25	Allegations Unsubstantiated	
H-89-00132-3	Food and Drug Administration	Unauthorized Release of Proprietary Information	89/09/06	90/01/10	Referred to DOJ	OCL/DOJ
H-89-00192-3	Food and Drug Administration	Unauthorized Release of Proprietary Information	89/10/26	90/01/12	Referred to DOJ	OCL/DOJ
H-89-00193-3	Food and Drug Administration	Unauthorized Release of Proprietary Information	89/10/26	90/01/12	Referred to DOJ	OCL/DOJ
H-89-00194-3	Food and Drug Administration	Unauthorized Release of Proprietary Information	89/12/20	90/01/12	Referred to DOJ	OCL/DOJ
2-89-00803-3	Food and Drug Administration/BIB	Unauthorized Use of an Investigational New Drug	89/10/31	90/02/01	Referral to DOJ	OCL/DOJ
1-88-00220-4	News Article	Unauthorized Use of an Investigational New Drug; Grant Fraud	88/10/20		To Be Closed	OI
8-89-00475-3	Food and Drug Administration	Unauthorized Use of Steroids in Clinical Studies	89/09/06	90/01/26	Referred to DOJ	OCL/DOJ
5-89-00715-3	Private Organization	Use of Another FDA Employee's Name to Obtain Credit	89/09/23		No FDA Violation	
2-89-00921-3	U.S. Attorney	Use of Infected Blood in Diagnostic Testing Products	89/11/27	90/01/26	Referred to DOJ	OCL/DOJ
8-89-00522-3	Anonymous	Use of Inferior/Improper Materials	89/07/14	90/01/25	Referred to DOJ	OCL/DOJ
5-88-00520-3	News Article	Use of Investigational New Drug Not Approved by FDA			Prosecution Declined	

Disposition of FDA Matters

Concluded (closed/to be closed)	75
Transferred to Joint Investigative Agency	47*
Referred to OCL/DOJ (referred/to be referred)	66
Generic Drug Cases (active/inactive)	8
Residual	17
TOTAL	213

*We have recently been made aware that in some of these matters, the joint investigative agency may be required to withdraw from their investigations since they also no longer have investigative jurisdiction. Accordingly, some of these matters may eventually fall into the category of matters referred to OCL/DOJ.



GAO

Report to the Chairman, Committee on
Governmental Affairs, U.S. Senate

April 1990

INSPECTORS GENERAL

Progress in Establishing OIGs at Designated Federal Entities

GAO/AFMD-90-[illegible]

31-649 0 - 90 - 9

GAO

United States
General Accounting Office
Washington, D.C. 20548

Accounting and Financial
Management Division

B-235163

April 24, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate

Dear Mr. Chairman:

The Inspector General Act Amendments of 1988 (Public Law 100-504) established offices of inspector general (OIGs) in 33 designated federal entities. In response to your request, we reviewed the progress made by these entities in establishing their OIGs.

The designated federal entities have taken steps to establish their OIGs in accordance with the 1988 amendments. All of the entities have officially established an OIG and have appointed an inspector general (IG) or an acting inspector general. In addition, all of the entities have developed policy documents describing the mission of the OIG and the IG's duties.

We found that IG independence, authority, and capability to do work were sometimes constrained because of limitations imposed by the entities. Most of these constraints were removed through our discussions with officials at these designated federal entities. However, problems in establishing effective OIGs remain. For example, (1) at least eight of the new OIGs have inadequate resources and (2) the entity head responsible for supervising the IG has not been correctly identified at two entities.

Background

Prior to the 1988 amendments, the Inspector General Act of 1978, as amended, provided for independent inspectors general, presidentially appointed, to conduct and supervise audits and investigations and recommend policies to promote economy, efficiency, and effectiveness as well as the prevention and detection of fraud and abuse in programs and operations of their agencies. IGs are responsible for keeping agency heads and the Congress fully informed of agency problems and corrective actions. IGs are required to report on the results of their audits and investigations and to prepare semiannual reports to agency heads and the Congress.

The Congress enacted the Inspector General Act Amendments of 1988 to establish statutory OIGs at 33 designated federal entities defined in the act.[1] (See appendix I for a list of the 33 designated federal entities.) The amendments provided for the entity heads to appoint their inspectors general. The powers and duties extended to the IGs appointed by the entity heads are essentially the same as those provided to presidentially appointed IGs. The 1988 amendments required the entities to establish their OIGs by April 17, 1989.

Objectives, Scope, and Methodology

The objectives of our review were to determine the designated federal entities' progress in implementing the 1988 amendments and to identify any problems they were encountering in so doing. We interviewed IGs, acting IGs, and other entity officials responsible for establishing the OIG at 27 entities. We reviewed draft and final policy documents, including IG position descriptions, statements of duties and responsibilities, mission and function statements, and memorandums of understanding with other entity components. We also reviewed legal opinions about implementation of the 1988 amendments.

We obtained similar information on the remaining five entities from separate reviews we have conducted of these entities' progress in establishing OIGs. We issued reports on the status of OIG implementation at the Tennessee Valley Authority (TVA) and at the National Science Foundation.[2] We plan to issue a report on the Federal Deposit Insurance Corporation, the Federal Reserve Board, and the National Credit Union Administration.

We met with representatives of the Office of Management and Budget (OMB) and the President's Council on Integrity and Efficiency (PCIE). We also met with representatives of the PCIE Coordinating Conference—an interagency committee monitoring entity efforts to implement OIGs—to obtain their views on the establishment of OIGs at designated federal entities.

In accordance with your request, we are providing details on the status of OIG implementation at the Corporation for Public Broadcasting and the Federal Election Commission. Both entities experienced difficulty in establishing an OIG because officials at each entity thought the OIG concept conflicted with the entity's mission.

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[1] One of the entities, the Federal Home Loan Bank Board, was abolished by Public Law 101-73 (August 1989), leaving 32 designated federal entities.

[2] Inspectors General: Adequacy of TVA's Office of Inspector General (GAO/AFMD-89-68, July 3, 1989) and Inspectors General: Establishment of the National Science Foundation's Office of Inspector General (GAO/AFMD-90-15, April 10, 1990).

At your request, we did not obtain agency comments on a draft of this report. However, the views of responsible entity officials were sought during the course of our work and are incorporated where appropriate. We explained to officials at each entity where we identified problems that certain provisions in their policy documents were not consistent with the act and should be changed.

Our audit work was conducted in accordance with generally accepted government auditing standards and was conducted from July 1989 to January 1990.

All Designated Federal Entities Have Established an OIG

Our review showed that all of the designated federal entities have taken steps to establish their OIGs in accordance with the 1988 amendments. All entities have established an office of inspector general and have appointed an IG or acting IG. In addition, all entities have prepared policy documents describing the mission and function of the OIG.

While the entities' initial policy documents did not always reflect the role and authority of the IG and needed modification, entity officials were generally cooperative in reviewing these issues with us and making appropriate revisions to their documents. However, at the National Archives and Record Administration, documents containing questionable provisions have not yet been revised. The documents with these provisions were prepared by the entity's policy staff and show that the entity head has considerable control over the IG's audit plan. He can require audits to be done and has approval authority over other audits. In addition, the IG must notify the entity head before taking cases to a U.S. attorney. We believe these types of provisions restrict the IG's statutory independence. The IG told us that he disagreed with these provisions and notified entity officials of his disagreement. He stated that he has now been authorized to write his own operating procedures and intends to correct the problems we cited.

Lack of Resources May Restrict Operations for at Least Eight OIGs

The designated federal entities expend considerable resources and are responsible for carrying out important federal activities. Their OIGs need to have the necessary resources to fulfill their statutory mission of detecting and preventing fraud, waste, and abuse. (See appendix I for a comparison of entity and inspector general resources.)

In 8 of the 32 entities, the IG was the only professional staff person assigned to the office. In most cases, a secretary was also provided. Not having sufficient resources can prevent IGs from adequately carrying out their roles and responsibilities. The IGs lacking resources told us they intend to use staff from management or other federal agencies to accomplish their plans or to rely on contracting out for audit services.

At one of these entities—the Federal Trade Commission—the IG told us he intends to contract with private accounting firms for all audits and to obtain investigative services from within the entity's office of general counsel. We believe the lack of permanent staff would not permit the OIG to develop in-depth and comprehensive knowledge of agency programs and would thus limit the OIG's effectiveness. At the remaining seven entities, OIGs plan to obtain additional staff from the entity or another federal agency or to contract out for temporary assistance until the OIG can obtain additional staff.

We believe that relying on management staff could detract from IG independence and objectivity. Furthermore, the lack of permanent staff could hamper an IG's ability to develop in-depth, continuous knowledge of agency operations. We are concerned that a minimal level of staff resources will not permit effective fulfillment of IG responsibilities as defined in the act. We believe one professional staff person—the IG himself—is not sufficient for any OIG to accomplish the work required. Past experience has shown that having too few OIG resources restricts the effectiveness of an OIG.[3]

We believe the appropriate staff level for each entity's OIG must be determined based on the IG's work plan, which includes an assessment of priorities and a determination of staff levels needed to perform the work. Most IGs were in the process of assessing their staff needs and were discussing staff levels with entity management. They pointed out that they were still getting organized and needed some experience over a period of time to adequately determine their staff needs.

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[3] The Inspector General Act of 1978: A 10-Year Review (House Report No. 100-1027, October 3, 1988) pp. 11-17.

GAO Disagreement With the OMB-Identified Head at Two Entities

The 1988 amendments require that the inspector general report to the head of the designated federal entity and to no other employee. According to the amendments, the authority to appoint and supervise the IG cannot be delegated to any other party. This provision helps ensure that IGs will be independent from program management and will have the authority to carry out their responsibilities. The 1988 amendments define the head of the entity as the head designated by statute, or, if no such designation exists, the chief policy-making officer or board as identified in a list published by OMB. The 1988 amendments required that OMB, in consultation with the Comptroller General, publish its first list of entity heads in the Federal Register by April 30, 1989, and annually thereafter.

We disagree with the identification of entity heads for the Pension Benefit Guaranty Corporation (PBGC) and the Legal Services Corporation (LSC) in the list published on November 9, 1989. The statutes governing PBGC and LSC do not explicitly designate the head of these entities. Accordingly, the 1988 amendments require that OMB's list identify the chief policy-making officer or board as the head of PBGC and LSC. OMB's list identified PBGC's executive director as the entity head, and in the case of LSC, the list identified the entity's president. Neither of these officers is the chief policy-making officer or board for the entities. As required by the 1988 amendments, we consulted with OMB on its proposed list of entity heads prior to publication of the OMB list. We expressed concern with the entity heads OMB proposed for PBGC and LSC and suggested that the board of directors or the chairman would be a better choice for these entities.

Officials we interviewed at both entities agreed with OMB's decision even though both entities have boards of directors who have policy-making authority. These officials indicated that the entity head identified is largely responsible for running the entity's daily operations. They also indicated that the boards of directors meet infrequently and their members are geographically dispersed.

Our disagreement with the OMB list is based on the statutes and regulations governing PBGC and LSC and on our belief that inspectors general should be independent from program officials who run the very operations the IGs audit and investigate. The statute governing PBGC does not describe its powers and duties as being those of a particular board or person. But the statute does provide that the corporation shall be administered by the Secretary of Labor, as Chairman of the Board of Directors, in accordance with policies established by the Board [29

U.S.C. 1302 (a)(d)]. In this regard, we note that PBGC's own regulations state that the Board "shall establish the policies" of PBGC and that final decisions on certain policy matters are reserved to the Board and may not be delegated [29 C.F.R. 2601.3 (1989)]. The position of executive director is not established by statute, and, therefore, the executive director has no authority, policy-making or otherwise, other than that provided by the Board. The 1988 amendments do not include responsibility for an entity's daily operations as criteria for who shall be identified as an entity head on OMB's list. In view of PBGC's statute and regulations, we find no basis for the executive director being, in the words of the 1988 amendments, the chief policy-making officer of PBGC.

The statute governing LSC does not describe its powers and duties as being those of a particular board or person. However, the statute does refer to the policy-making function of the LSC Board.[4] Furthermore, LSC's own regulations provide that the president's responsibility and authority as Chief Executive Officer is subject to the direction and policies established by the Board [45 C.F.R. 1601.33 (1988)]. Therefore, we also believe that the president cannot be viewed as the chief policy-making officer of LSC.

Our disagreement with OMB's list is not based solely on our reading of the statutes and regulations described above. As far back as 1977, when the Congress was considering the bill which ultimately became the Inspector General Act of 1978, it expressed the view that having auditors and investigators report to agency officials with program operating responsibilities was a deficiency in organizational structure and a conflict of interest [S. Rep. No. 95-1071, p. 7 (1978); H. Rep. No. 95-584, p. 5 (1977)]. The Congress thus provided that inspectors general would report only to the agency head or the officer next in rank if the agency head so delegated. This delegation is not authorized by the 1988 amendments for the 33 designated entities. Since the PBGC executive director and the LSC president are largely responsible for the daily operations of their entity, and thus the very activities the inspectors general will be reviewing, we believe OMB's designation will create the type of organizational structure deficiency the Congress sought to correct.

Accordingly, we continue to believe that OMB's list should identify the board of directors or the chairman as the head of PBGC and LSC.

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[4] The LSC president's authority to appoint and remove LSC employees is subject to the general policies of the Board [42 U.S.C. 2996d].

OIGs at the Corporation for Public Broadcasting and the Federal Election Commission Were Properly Established

At your request, we examined the issues raised by the Corporation for Public Broadcasting and the Federal Election Commission in establishing their OIGs. Officials at both entities expressed serious concerns about the establishment of an OIG at their entities because they thought the OIG's role would conflict with the entities' missions. However, we found that an OIG could function satisfactorily at these entities because the IG's role would be to audit and investigate the activities of the entity and not become involved in the entity's program operating responsibilities. After our discussions with officials at both entities, most of their concerns over the establishment of an OIG were resolved.

Corporation for Public Broadcasting

The Corporation for Public Broadcasting (CPB) originally objected to having a statutory IG because CPB thought that it conflicted with its authorizing legislation, which protects the Corporation from government interference. Officials were concerned that the activities of the IG would undermine CPB's ability to protect the recipients of its funds from extraneous interference and control over program content and broadcasting activities, both of which are protected by the First Amendment. Because of these concerns, CPB officials told us that they initially attempted to place restraints on the IG role so that it would not conflict with CPB's mission or interfere with the free expression of CPB funding recipients.

In reviewing CPB's original statement of IG duties and responsibilities, we found it had made one individual serve as both inspector general and director of audit. As IG, he would report to the Congress and management on his investigative activities. But as director of audit, he would report on his audit activities to management only. The IG act requires that audit activities be included in the IG's duties and that the IG report to both the Congress and management on all of his activities, including audits. The arrangement originally established by CPB would have the IG reporting only to management for that part of his duties performed as director of audit. We also found that the board of directors of CPB had delegated the authority to supervise the IG to CPB's president, and this delegation is not permitted by the act.

We told CPB officials that we had reviewed the entity's role and mission and concluded that an OIG could function satisfactorily at CPB because the IG's role was to audit and investigate the activities of CPB and not become involved with CPB's program operating responsibilities. We also stated that the act intended for the IG to report to the chief policy-making officer or board at the entity and that having an IG's role divided into two parts with different rules governing each was not consistent with the intent of the IG act.

Following our discussions of these issues, CPB officials reconsidered their position and changed their policies. The board of directors assumed responsibility for appointing the IG and maintaining general supervision. A revised policy document modified the role of the IG to include the duties of the director of audit and the duties of the inspector general, and provided that in the fulfillment of all of these duties, the IG would be responsible to both the Congress and the entity head.

Federal Election Commission

The Federal Election Commission (FEC) took the position that the operations of its OIG needed to be constrained. The FEC maintained that its audits and investigations of presidential campaign funds and other campaign financing entities are part of the programmatic responsibilities of the FEC and not the responsibility of an FEC IG. The FEC also claimed that the IG concept threatened the political balance within the agency, which requires an absolute majority approval for all policies and actions.

Bills were introduced in the House of Representatives and Senate to remove the FEC from the IG Act Amendments of 1988. In a bill authorizing appropriations for the FEC for fiscal year 1990 (H.R. 1326), the House Committee on House Administration included a provision to strike the FEC from the IG Act Amendments of 1988. However, the House Government Operations Committee subsequently recommended that the bill retain the FEC in the IG Act Amendments of 1988, with the stipulation that the FEC IG is not to undertake the FEC's external audit functions. The Senate Committee on Rules and Administration also introduced a bill (S. 1074) to authorize appropriations for the FEC for fiscal year 1990 with a provision to remove the FEC from the IG Act Amendments of 1988. Neither bill passed.

The FEC has established an OIG, appointed an IG, and developed OIG policy documents in a manner consistent with the 1988 amendments. Based on our review of the FEC's role and mission, we believe an IG can function satisfactorily at FEC because the IG's role is to audit and investigate the functions of FEC, not the presidential campaign funds or campaign financing entities which are the subject of FEC's program operating responsibility. We agree that the FEC IG should not engage in activities deemed to be program operating responsibilities of the Commission.

Conclusions

Designated federal entities have taken steps to establish offices of inspector general in accordance with the 1988 amendments. However, the level of resources provided to at least eight of the new OIGs may not be adequate for the successful achievement of OIG objectives. If adequate resources are not provided, the IGs' objectivity and independence could be impaired because they may rely too heavily on resources borrowed from the entity. In addition, a lack of permanent staff could prevent IGs from developing an in-depth, continuous knowledge of agency programs. During the course of our review, most of the IGs were in the process of assessing their staff needs and were discussing staff levels with entity management.

OMB's list has identified chief executive officers as the entity heads at PBGC and LSC, and entity officials have agreed with OMB's judgment. These officers are responsible for the entities' operations and are not the entities' chief policy-making officers or board. The 1988 amendments state that the head of the entity is the head designated by statute, or if no such designation exists, the chief policy-making officer or board as identified in a list published by OMB. Based on this provision, we believe the board or chairman of the board at these entities would be a better choice because at these entities, they perform the chief policy-making function.

Recommendation

To ensure that the IGs at the Pension Benefit Guaranty Corporation and at the Legal Services Corporation are reporting to the proper authority, OMB, in its next annual list of entity heads, should identify the board of directors or its chairman as the entity head at these entities.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 15 days from the date of this letter. At that time, we will send copies to the Director of the Office of Management and Budget; the Chairman of the Committee on Government Operations, House of Representatives; all statutory inspectors general and acting inspectors general; and other interested parties upon request. Major contributors to this report are listed in appendix II.

Sincerely yours,

Donald H Chapin

Donald H. Chapin
Assistant Comptroller General

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Letter 1

Appendix I Thirty-Three Designated Federal Entities: Resources Compared to OIG Staff 14

Appendix II Major Contributors to This Report 15

Abbreviations

CPB	Corporation for Public Broadcasting
FEC	Federal Election Commission
IG	inspector general
LSC	Legal Services Corporation
OIG	Office of Inspector General
OMB	Office of Management Budget
PBGC	Pension Benefit Guaranty Corporation
PCIE	President's Council on Integrity and Efficiency
TVA	Tennessee Valley Authority

Appendix I

Thirty-Three Designated Federal Entities: Resources Compared to OIG Staff

	1990 Estimate		
Designated federal entity	Total entity staff size[a] (Full-time positions)	Budget authority[a] (Dollars in thousands)	Size of OIG staff[b] (Full-time equivalents)
ACTION	460	$175,665	6
Amtrak	[c]	604,685	75
Appalachian Regional Commission	40	147,900	2
Federal Reserve System	1,576	[d]	9
Board for International Broadcasting	17	373,021	2
Commodity Futures Trading Commission	545	37,186	3
Consumer Product Safety Commission	514	35,147	1.5
Corporation for Public Broadcasting	[c]	229,391	11
Equal Employment Opportunity Commission	3,200	184,926	12.1
Farm Credit Administration	594	[d]	6
Federal Communications Commission	1,835	82,550	3
Federal Deposit Insurance Corporation	3,585	1,996,557	144
Federal Election Commission	243	15,330	2
Federal Home Loan Bank Board[e]	[e]	[e]	[e]
Federal Labor Relations Authority	256	17,590	2
Federal Maritime Commission	225	15,452	3
Federal Trade Commission	899	53,876	2
Interstate Commerce Commission	661	44,205	1
Legal Services Corporation	[c]	316,525	6
National Archives and Records Administration	1,785	125,112	10
National Credit Union Administration	920	[d]	6
National Endowment for the Arts	219	171,285	8
National Endowment for the Humanities	251	157,510	6
National Labor Relations Board	3,000	140,111	7
National Science Foundation	1,096	2,103,608	25
Panama Canal Commission	8,056	4,078	22
Peace Corps	1,080	166,049	16.5
Pension Benefit Guaranty Corporation	562	[d]	6
Securities and Exchange Commission	2,451	143,717	7
Smithsonian Institution	5,308	313,554	20
Tennessee Valley Authority	21,000	476,979	155
U.S. International Trade Commission	502	38,477	2
U.S. Postal Service	655,584	4,577,077	4,419

[a] Budget authority and total agency staff (full-time positions) were derived from Budget of the United States Government, Fiscal Year 1991.

[b] Includes professional and secretarial staff planned for 1990 based on entity estimates.

[c] Data not available from budget.

[d] No budget authority.

[e] Entity abolished by Public Law 101-73 (August 1989).

Appendix II

Major Contributors to This Report

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Office of the General Counsel, Washington, D.C.

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U.S. Department of Justice

Office of Legal Counsel MJA 12/1

Office of the
Assistant Attorney General

Washington, D.C. 20530

March 9, 1989

Memorandum For Jerry G. Thorn
Acting Solicitor, Department of Labor

Re: Authority of the Inspector General
to Conduct Regulatory Investigations

This memorandum responds to the request of September 23, 1988, as supplemented by a letter of December 5, 1988, for the opinion of this Office as to the scope of the investigative authority of the Inspector General of the Department of Labor under the Inspector General Act of 1978, Pub. L. No. 95-452, 92 Stat. 1101, as thereafter amended (the Act). Specifically, we were asked to determine whether the authority granted the Inspector General includes the authority to conduct investigations pursuant to statutes that provide the Department with regulatory jurisdiction over private individuals and entities that do not receive federal funds.

As set forth below, we conclude that the Act does not generally vest in the Inspector General authority to conduct investigations pursuant to regulatory statutes administered by the Department of Labor.[1] Rather, Congress intended the Inspector General to be an objective official free from general regulatory responsibilities who investigated the employees and operations of the Department, as well as its contractors, grantees and other recipients of federal funds, so as to root out waste and fraud. Thus, the Inspector General has an oversight rather than a direct role in investigations conducted pursuant to regulatory statutes: he may investigate the Department's conduct of regulatory investigations but may not conduct such investigations himself.[2]

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[1] We shall henceforth refer to such investigations as "regulatory investigations." Such investigations generally have as their objective regulatory compliance by private parties. On the other hand, investigations properly within the ambit of the Inspector General generally have as their objective the elimination of waste and fraud in governmental departments including waste and fraud among its employees, contractors, grantees and other recipients of federal funds. As we note below, however, see n. 20 *infra*, the Inspector General may investigate private parties who do not receive federal funds when they act in collusion with the Department's employees or other recipients of federal funds to avoid regulatory compliance.

I. Background

A dispute has arisen between the Solicitor and Inspector General of the Department of Labor as to the types of investigations the Inspector General is authorized to conduct. It is undisputed that the Inspector General is authorized to conduct investigations of the Department's operations, employees, contractors, grantees and other recipients of federal funds. What is disputed is whether the Inspector General is also authorized to conduct investigations pursuant to statutes that grant the Department regulatory authority over individuals and entities outside the Department who do not receive federal funds.

The dispute has precipitated interest beyond the Department of Labor.[3] At issue is the authority of the Inspector General

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[2] When our opinion was first requested in this matter we attempted to limit our opinion to the specific situation that prompted the dispute between the Solicitor of Labor and the Inspector General. See Letter of Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel to George R. Salem, Solicitor of Labor (Oct. 28, 1988); Letter of Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel to J. Brian Hyland, Inspector General, Department of Labor (Oct. 28, 1988). Your predecessor replied that the dispute had not arisen from a specific statutory or factual context, but rather from the Inspector General's claim of "general authority to investigate any violation of any statute administered or enforced by the Department." Letter of George R. Salem to Douglas W. Kmiec at 1 (Dec. 5, 1988). In his response, the Inspector General agreed that the dispute concerned the existence of such general authority. Letter of J. Brian Hyland to Douglas W. Kmiec (Dec. 22, 1988). Accordingly, while we have made reference to certain specific regulatory schemes (such as the Fair Labor Standards Act) which Mr. Salem offered as paradigmatic examples of statutes giving rise to the general dispute, we have responded to the request with an opinion establishing general principles. We would be pleased to give more specific guidance with respect to the scope of the Inspector General's authority in the context of a particular statutory scheme should you or the Inspector General so request.

[3] The Inspector General Act is a generic one in the sense that its core provisions apply to most of the departments and agencies of the federal government. See 5 U.S.C. App. 2(1), 11(2) & 8E. Our opinion, therefore, will necessarily have applicability beyond the Department of Labor. For this reason, this opinion has been of interest to various Inspectors General

(continued...)

under regulatory statutes such as the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201-219, and the Occupational Safety and Health Act ("OSHA"), 29 U.S.C. 651-678, which impose restrictions on individuals and entities who are not employees of a Department and who are not contractors, grantees or other recipients of federal funds distributed by the Department.[4] FLSA, for instance, requires that a fixed minimum wage be paid to any covered employee, id. 206, as well as imposing other regulatory requirements such as restricting the work week to 40 hours unless the employee is compensated at not less than 1/2 times the regular rate. Id. 207. Similarly, OSHA imposes on employers the duty to furnish a safe workplace and to comply with the safety standards promulgated by the Secretary of Labor under its authority. Id. 654(a).

The Secretary of Labor is the official charged with administering these statutes. That authority includes specific grants of enforcement and investigative authority. See, e.g., id. 212(b) and 657. The Inspector General, however, believes that the provisions of the Act granting him authority to conduct investigations "relating to the programs" of the Department vest in him general investigative authority under these regulatory statutes. Memorandum from J. Brian Hyland, Inspector General, Department of Labor to the Deputy Secretary, Dept. of Labor (Oct. 17, 1988) at 2.[5] Indeed, he argues that since the Act gives him

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[3] (...continued) in other departments, and in addition to the materials submitted by the Inspector General of the Department of Labor, we have reviewed carefully the letters and memoranda other Inspectors General have submitted to us. Memorandum for the Deputy Secretary of Labor from Richard Kusserow, Inspector General, Department of Health and Human Services (Oct. 6, 1988); Letter to Douglas W. Kmiec from Charles R. Gillum, Inspector General, Small Business Administration (Nov. 4, 1988); Letter to Douglas W. Kmiec from John W. Melchner, Inspector General, Department of Transportation (Dec. 1, 1988); Letter to Douglas W. Kmiec from Paul A. Adams, Inspector General, Department of Housing and Urban Development (Nov. 30, 1988); Letter to Douglas W. Kmiec from Francis D. DeGeorge, Inspector General, Department of Commerce (Dec. 1, 1988).

[4] At our request, the Solicitor provided a detailed description of three investigations undertaken by the Inspector General. This was to clarify for our benefit the nature of the dispute between the Solicitor and the Inspector General. We have addressed here the general legal question asked by the Solicitor. We express no opinion as to whether any of these particular investigations was authorized.

[5] The Inspector General does not claim that he has the same enforcement and litigative authority as the Secretary of Labor.
(continued...)

authority to "supervise" all investigations "relating to programs" of the Department of Labor, he has supervisory authority over the Secretary of Labor with respect to her exercise of her statutory authority to conduct investigations pursuant to the regulatory statutes the Department administers. Id. at 7.

The Solicitor disagrees. He views the Inspector General as an auditor and internal investigator for the Department -- authorized to investigate the operations of the Department, the conduct of its employees and the Department's contractors, grantees and other recipients of federal funds.[6]

II. Discussion

The Act established the Office of Inspector General in the Department of Labor and in the other covered departments. The purpose of the Act, as stated in section 2, is "to create independent and objective units" to "conduct and supervise audits and investigations relating to programs and operations" of the covered departments, id. (2)(1), and "to provide leadership and coordination and recommend policies for activities designed (A) to promote economy, efficiency, and effectiveness in the administration of, and (B) to prevent and detect fraud and abuse in, such programs and operations . . ." Id. 2(2).

Section 4 of the Act provides authority that is correlative to these responsibilities:

> (a) It shall be the duty and responsibility of each Inspector General, with respect to

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[5] (...continued) For instance, he neither claims authority under the FLSA to impose civil monetary penalties, nor the authority to initiate civil litigation. Rather, he claims the authority to conduct regulatory investigations and refer the results to the Department of Justice for civil action or criminal prosecution.

[6] The Solicitor does not question the authority of the Inspector General to conduct investigations relating to organized crime and racketeering to the extent that authority derives from the jurisdiction of the Office of Special Investigations whose functions were specifically transferred to the Inspector General in the Act. 5 U.S.C. App. 9(a)(1)(G). Various issues relating to the scope of that authority are addressed in an earlier opinion of this Office. Memorandum to Stephen S. Trott, Assistant Attorney General, Criminal Division, from Larry L. Simms, Deputy Assistant Attorney General, Office of Legal Counsel, Re: On-Site Inspection of Books and Records in Criminal Investigations of Labor Unions and Employee Benefit Plans (Dec. 23, 1983).

> the establishment within which his Office is established--
>
> > (1) to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of such establishment; . . .
> >
> > (3) to recommend policies for, and to conduct, supervise, or coordinate other activities carried out or financed by such establishment for the purpose of promoting economy and efficiency in the administration of or preventing and detecting fraud and abuse in, its programs and operations; . . .

Furthermore, section 6(a)(2) authorizes the Inspector General "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are [in his judgment] necessary or desirable . . ."

Finally, section 9(a)(2) authorizes the transfer of "such other offices or agencies, or functions, powers, or duties thereof, as the head of the establishment involved may determine are properly related to the functions of the [Inspector General] and would, if so transferred, further the purpose of this Act," but adds the caveat: "except that there shall not be transferred to an Inspector General . . . program operating responsibilities."

The question presented is the meaning of the phrase "relating to the programs and operations" in section 4 and "relating to the administration of the programs and operations" in section 6, as well as similar language elsewhere in the Act.[7]

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[7] In a supplemental letter to us, the Inspector General argues that it is necessary to accept his broad view of his authority lest a situation be created whereby there was no entity investigating a wide-range of criminal offenses under the regulatory jurisdiction of the Department of Labor. Letter from J. Brian Hyland to Douglas W. Kmiec, Assistant Attorney General (Dec. 22, 1988). Specifically, he argues that while the Department of Labor may generally have criminal investigative authority over the offenses listed in the labor provisions (Title 29 of the U.S. Code) it does not, with one specific exception, have criminal investigative authority over the general criminal provision of Title 18. Id. at 1-2. By contrast, the Inspector General argues that he does possess criminal investigative

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The Act does not define terms such as "investigations" and "programs," nor does the Act expressly address whether the Inspector General is authorized to conduct investigations pursuant to regulatory statutes administered by the Department. But we think the meaning of the statutory language is clear when examined in the context of the structure and legislative history of the Act.

The impetus for the Inspector General Act of 1978 was revelations of significant corruption and waste in the operations of the federal government, and among contractors, grantees and other recipients of federal funds. S. Rep. No. 1071, 95th Cong., 2d Sess. 4 (1978). Furthermore, Congress concluded that the existing audit and investigative units were inadequate to deal with this problem because they reported to, and were supervised by, the officials whose programs they were to audit and investigate. *Id*. at 5-6; H.R. Rep. No. 584, 95th Cong., 1st Sess. 5 (1977).

The Act addressed both the underlying problem and this organizational defect. The Inspector General was to deal with "fraud, abuse and waste in the operations of Federal departments and agencies and in federally-funded programs . . ." S. Rep. No. 1071 at 4. The Inspector General was to be an objective official reporting directly to the head of the department and not to the program head whose operations were to be audited and investigated. H.R. Rep. No. 584 at 11. This objectivity was to be fostered by a lack of conflicting policy responsibility: "[T]he legislation gives the [Inspector General] no conflicting policy

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[7] (...continued)
authority under Title 18. *Id*. at 2.

The Inspector General's argument is misconceived. We have no doubt that the Inspector General has criminal investigative authority, see 5 U.S.C. App. 4(d); *United States v. Aero Mayflower Transit Co.*, 831 F.2d 1142, 1145 & n.3 (D.C. Cir. 1987), but he only has that authority *within the scope* of his statutorily-granted investigative authority. It is the scope of that authority that is at issue here.

Moreover, we note that it would by no means be anomalous if neither the Secretary of Labor nor the Inspector General had criminal investigative authority over some statutory violation that affected the Department of Labor. The Federal Bureau of Investigation ("FBI") has general criminal investigative authority over all violations of federal law. 28 U.S.C 533(1); 28 C.F.R. 0.85(a). See also 28 U.S.C. 535. Other departments or agencies have authority to conduct criminal investigations only "when investigative jurisdiction has been assigned by law to such departments and agencies." 28 U.S.C. 533. Thus, it is not unusual for the FBI to have exclusive criminal investigative authority with regard to certain statutory violations.

responsibilities which could divert his attention or divide his time; his sole responsibility is to coordinate auditing and investigating efforts and other policy initiatives designed to promote the economy, efficiency and effectiveness of the programs of the establishment." S. Rep. No. 1071 at 7.

The legislative history of the Act reflects a consistent understanding that the role of the Inspector General was to be that of an investigator who would audit and investigate the operations of the departments and their federally-funded programs. See, e.g., S. Rep. No. 1071 at 27 ("The [Inspector General's] focus is the way in which Federal tax dollars are spent by the agency, both in its internal operations and its federally-funded programs").[8] The legislative history also

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[8] The Inspector General has quoted to us various statements made by Congressmen during hearings or debates that he asserts support his view that Congress intended that Inspectors General have authority to investigate violations of regulatory statutes administered by their departments. These quotations include general statements to the effect that Inspectors General were to have broad authority to investigate the programs and employees of the departments, see, e.g., Oct. 17, 1988, Memo at 3 (quoting Cong. Fountain), as well as general statements that Inspectors General would restore public confidence in government, see, e.g., id. at 4 n.8 (quoting Cong. Levitas). None of these quotations provides support for the view that Congress intended to vest the Inspectors General with authority over regulatory investigations.

The Inspector General also argues that the hearings made Congress aware that the then-existing Inspectors General were undertaking regulatory investigations under the departments' regulatory statutes, but the evidence he cites does not support his argument. For instance, he quotes a report submitted to a Senate Committee at the same time as the Senate was considering the Act in which the HEW Inspector General defined "abuse" as covering "a wide variety of excessive services or program violations, and improper practices," id. at 4, but there is nothing in the quotation to indicate that the reference to "program violations" meant general regulatory enforcement rather than violations of law committed by department employees or its contractors or employees. Similarly, the Inspector General cites references in the testimony of the non-statutory Inspector General of the Department of Agriculture at the House committee hearings regarding investigations of meat and grain inspections which had been conducted by his office. We have examined the portions of the testimony of the Inspector General and other officials of the Department of Agriculture at these hearings which dealt with these investigations. The only relevant colloquy we can find occurred when Rep. Jenrette asked the Audit Director of the Department of Agriculture whether the "majority" of these investigations had to do with employees of that

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rejects the idea that Inspectors General would have the authority to conduct regulatory investigations of the type at issue here. The most comprehensive statement is in the House Report:

> While Inspectors General would have direct responsibility for conducting audits and investigations relating to the efficiency and economy of program operations and the prevention and detention of fraud and abuse in such programs, *they would not have such responsibility for audits and investigations constituting an integral part of the programs involved*. Examples of this would be audits conducted by USDA's Packers and Stockyards Administration in the course of its regulation of livestock marketing and *investigations conducted by the Department of Labor as a means of enforcing the Fair Labor Standards Act*. In such cases, the Inspector General would have oversight rather than direct responsibility.

H.R. Rep. No. 584 at 12-13 (emphasis added). See also S. Rep. No. 1071 at 27-28.[9]

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[8] (...continued)
Department. The response was: "Yes, I would say most of the time it had to do with some sort of inspection function and inspection employees. Also, the plants that had been afforded meat inspection service or meat grading service". *Establishment of Offices of Inspector General: Hearings on H.R. 2819 Before the Subcomm. of the House Comm. on Government Operations*, 95th Cong., 1st Sess. at 47 (1977). Rep. Jenrette then responded that this was appropriate because "employees of the Department . . . should certainly have oversight . . . before the citizen on the street," and that the people the taxpayers are paying should be subject to "control" and "investigat[ion]." *Id.* We believe, in fact, that the grain inspectors who had been the subjects of these investigations were licensees of the Department of Agriculture not employees. In any event, this testimony hardly provides support for the view that Congress generally understood that conducting regulatory investigations was part of the role of Inspectors General.

[9] Similarly, Congressman Levitas stated:

> The Inspectors General to be appointed by the President with the advice and consent of the Senate will first of all be independent and have no program responsibilities to divide allegiances. The Inspectors General will be responsible for audits and investigations only . . . . Moreover, the offices of Inspector General would not be a new 'layer

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The statement in the House Report that Inspectors General were to have "oversight" but not "responsibility for audits and investigations constituting an integral part of the program involved" is not surprising because to vest such authority in the Inspectors General would have constituted a fundamental alteration in the departments' regulatory authority. It would have taken away the power to control the investigatory portion of a department's regulatory policy from the official designated by statute or by the Secretary[10] and placed it in an official separate from the regulatory division of the department.[11] As

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[9] (...continued)

> of bureaucracy' to plague the public. They would deal exclusively with the internal operations of the departments and agencies. Their public contact would only be for the beneficial and needed purpose of receiving complaints about problems with agency administration and in the investigation of fraud and abuse by those persons who are misusing or stealing taxpayer dollars.

124 Cong. Rec. 10,405 (1978).

[10] For instance, as we have noted before, the Secretary of Labor is expressly provided with authority to engage in investigations to assure compliance with the health and safety regulations of OSHA. See 29 U.S.C. 657.

[11] The Inspector General argues, however, that no "policy" considerations would be implicated by his having supervisory authority over the regulatory investigations of the Department. While conceding that "[d]ecisions regarding the emphasis, focus, and type (civil, criminal, administrative) of program enforcement, and the best use of available program resources, can have substantive 'policy' ramifications," he states that "these considerations have little or no bearing when potential criminal violations are involved," and that it is toward uncovering such criminal violations that he intends to direct his efforts. Memorandum from J. Brian Hyland to the Deputy Secretary (Oct. 17, 1988) at 8. The Inspector General's argument fails to recognize that whether to choose criminal over civil remedies is one of the classic "policy" choices that a regulator must make.

The Inspector General also argues that his investigative activity implicates no "policy" concerns because he will refer cases to the Department of Justice, which will make the final decision as to whether to file criminal charges. Letter from J. Brian Hyland to Douglas W. Kmiec (Dec. 22, 1988) at 2-3. It is true that the Department of Justice has the final say over whether criminal charges will be filed. 28 U.S.C. 516, 519. But

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the legislative history makes clear, however, it was not the intention of Congress to make such a fundamental change in the regulatory structure of the departments and agencies of the federal government. Rather, Congress was concerned with waste of federal funds and the need for an independent official who could review the employees and operations of federal agencies.

The statement in the House Report that Inspectors General were not to conduct investigations "constituting an integral part of the programs involved" is also dictated by the nature of the Inspector General's role. The purpose of creating an Inspector General was to have an official in the department who would not have responsibility for the operations of the department and would thus be free to investigate and criticize. If the Inspector General undertakes investigations under the department's regulatory statutes, he could not perform this role. One of the Inspector General's functions is to criticize regulatory investigative policy, a function he cannot perform if it is his responsibility to set and implement that policy.

The Inspector General, for instance, indicates that he disagrees with the current regulatory investigative policy of OSHA which he views as illustrating "an ingrained philosophy of enforcement that subordinates and trivializes the investigation and prosecution of significant criminal felony violations in favor of civil and administrative remedies and petty criminal offenses (e.g., misdemeanors)." Letter from J. Brian Hyland to Douglas W. Kmiec (Dec. 22, 1988) at 4. We would expect therefore that the Inspector General might discharge his statutory "oversight" duty by preparing a report for the Secretary and Congress detailing this criticism of OSHA's regulatory investigative policies. See 5 U.S.C. App. 5. However, once the Inspector General assumes authority over OSHA's regulatory investigative activity -- as under his interpretation of the statutory language he is bound to do[12] -- he would become an

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[11] (...continued)
it is equally true that the Department of Justice is responsive to the policy judgments of the referring agencies, and will, within the limits of available resources, generally follow the wishes of the referring agency as to questions such as the appropriate balance between criminal and civil enforcement.

[12] Specifically, the Inspector General argues that the statutory mandate in section 4(a)(1) that the Inspector General is "to provide policy direction for and to conduct, supervise, and coordinate audits and investigations relating to the programs and operations of" the department vests *supervisory* power in him over all investigations conducted by the Department of Labor, including investigations such as those conducted under OSHA that are integral to the regulatory enforcement of the program. Memorandum for the Deputy Secretary from J. Brian Hyland, October 17, 1988 at 7.

official responsible for implementing policy. Thus, with regard to the regulatory investigations the Inspector General would be undertaking, there would be no truly objective person to investigate claims of misbehavior and abuse. The purpose of the Act is not only to protect the taxpayers' money, but also to serve as a check on mistreatment or abuse of the general public by government employees. If the Inspector General, however, is conducting and supervising regulatory investigations of the department, the very evil that Congress wanted to avoid by establishing an objective Inspector General would be created: namely, the responsible official would be charged with auditing and investigating his own office.

In sum, we think that the legislative history and structure of the Act provides compelling evidence that in granting the Inspector General authority to "conduct and supervise audits and investigations relating to programs and operations" of the department, 5 U.S.C. App. 2(1), Congress did not intend to grant the Inspector General authority to conduct, in the words of the House Report, "investigations constituting an integral part of the programs involved." Rather, the Inspector General's authority with respect to investigations pursuant to the Department's regulatory statutes is, again in the words of the House Report, one of "oversight." We therefore conclude that investigations undertaken pursuant to the Department of Labor's regulatory statutes, such as FLSA and the OSHA, are not the type authorized by the Act.

We also conclude that this type of regulatory investigative authority cannot be delegated by the Secretary to the Inspector General under section 9(a)(2) of the Act.[13] Section 9(a)(2) authorizes the Secretary to transfer additional functions to the

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[13] We do not address whether any other statute provides the Secretary with authority to delegate such functions to the Inspector General. Nor do we address how any such provision should be reconciled with the Act's express prohibition on the transfer of "program operating responsibilities" to an Inspector General.

Moreover, while we do not agree that Section 9(a)(2) provides authority to delegate the conduct of regulatory investigations to the Inspector General of Health and Human Services, see Memorandum for Dennis C. Whitfield, Deputy Secretary of Labor from Richard P. Kusserow, Inspector General, Department of Health and Human Services, Oct. 6, 1988 at 6-7, we believe that the Inspector General may possess authority to conduct certain investigations into the programs he references (such as Medicare) as part of his responsibility under the Act to investigate regulatory compliance by recipients of federal funds. We have not been asked, however, to review any specific statutes under the jurisdiction of the Secretary of HHS and thus do not address this question.

Inspector General but only if they are "properly related" to the functions of the Inspector General and would "further the purposes of this Act." It specifically forbids the transfer of "program operating responsibilities" to the Inspector General. Whether or not the conduct of investigations pursuant to regulatory statutes constitutes "program operating responsibilities" within the meaning of the Act, such investigative authority, as outlined above, is inconsistent with structure and purpose of the Act and cannot be said to be "properly related" to the Inspector General's functions, nor could the transfer of these functions to the Inspector General be said to "further the purpose of the Act."[14] Thus, if the Secretary and the Inspector General believe that there is a need for the Inspector General to undertake particular types of regulatory investigations they should seek from Congress specific amendments of the Act.[15]

Our conclusions here are consistent with the decision of the district court in United States v. Montgomery County Crisis

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[14] We also disagree with the Inspector General that he can assume criminal investigative authority by means of a Memorandum of Understanding ("MOU") with the FBI. As this Office has previously stated, the Attorney General does not have the authority to delegate his criminal investigative authority under 28 U.S.C. 533 to other departments or agencies of the government. *See*, *e.g.*, Memorandum for William F. Weld, Assistant Attorney General, Criminal Division, from Charles J. Cooper, Assistant Attorney General, re: The Investigative Jurisdiction of the Department of Labor Over Certain Criminal Matters (Oct. 28, 1986) at 3-5. An MOU with the FBI is only appropriate where the department or agency already has criminal investigative authority concurrent with that of the FBI. *Id.* at 5.

Accordingly, insofar as any MOU purports to provide the IG with criminal investigative authority not specifically granted by statute it should be revised. On the other hand, the Department of Justice may deputize officials in other agencies, including investigators assigned to an Inspector General's office, to enforce the criminal law. See, e.g., 28 U.S.C. 562; 28 C.F.R. 0.19(a)(3). Of course, criminal investigations by deputized officials in other agencies remain under the supervision of the Department of Justice.

[15] The Act itself contains what appears to be at least one specific exception in the authorization of the transfer of the Office of Special Investigations in the Department of Labor to Inspector General. *See* note 6 *supra*. In 1988, there was also an attempt to transfer the Office of Investigations at the Nuclear Regulatory Commission ("NRC") to the new office of the Inspector General of NRC but that attempt did not succeed. *See* note 19 *infra*

Center, 676 F. Supp. 98 (D. Maryland 1987).[16] In this case, the

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[16] The conclusion we reach here is also consistent with an earlier opinion of this Office. Memorandum from Larry L. Simms, Office of Legal Counsel, to Michael G. Kozak, Deputy Legal Adviser, Department of State (August 17, 1984). In this opinion we considered among other questions whether the Inspector General of the Department of State had authority only to investigate "passport and visa malfeasance" under 18 U.S.C. 1542-1546 (malfeasance or criminal activity on the part of Department of State employees in obtaining passports or visas for themselves or others) or whether he also could investigate "passport and visa fraud" under 18 U.S.C. 1541 (criminal deceit in passport or visa acquisition by persons other than Department of State employees). At that time, the authority of the Inspector General of the Department of State derived from the Foreign Service Act of 1980, 22 U.S.C. 3929. (The Department of State was first brought within the ambit of the Act by Pub. L. No. 99-399, 100 Stat. 867 (1986).) The Foreign Service Act, however, had been "patterned" after the Inspector General Act of 1978 and explicitly incorporated the portions of the Act granting investigative authority. Thus, we looked to the structure and legislative history of the Act for guidance in determining the scope of the investigative authority possessed by the Inspector General under the Foreign Service Act. Memorandum at 3-4. Our conclusion was that legislative history of the Act "suggests strongly that Congress intended the focus of the Inspector General's authority to be the conduct of Department employees or contractors as opposed to the conduct of outside persons who may have occasion to deal with the Department." *Id*. at 5. Ultimately we concluded that Inspector Generals did not have authority to investigate "passport and visa fraud," *i.e.*, fraud not involving employees of the Department of State. *Id*. at 6-7.

Our opinion is also consistent with various judicial decisions upholding the subpoena power of Inspectors General in cases involving investigations of contractor or grantee fraud. *See*, *e.g.*, *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164 (3rd Cir. 1986) (Inspector General of Department of Defense investigation of defense contractor); *United States Department of Housing and Urban Development v. Sutton*, 68 B.R. 89 (E.D. Mo. 1986) (Inspector General of HUD investigation of properties insured by HUD). The only judicial opinion that we are aware of that is possibly inconsistent with our opinion is an unreported district court opinion that was supplied to us by the Inspector General, *United States v. H.P. Connor* (Civ. No. 85-4638, D.N.J., Dec. 9, 1985). This decision involved the enforcement of a subpoena issued by the Inspector General in the course of an investigation of alleged Davis-Bacon Act violations. In an opinion enforcing the subpoena, the court stated: "No argument can be made that this investigation is beyond the Inspector General's statutory grant." Slip Op. at 6. There is no citation

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Inspector General of the Department of Defense had issued a subpoena to a community counseling center seeking production of documents relating to telephone calls made by a member of the United States Navy who was allegedly suicidal and who had allegedly disclosed classified information during the telephone calls. In holding the subpoena to be outside the scope of the Inspector General's authority, the court pointed to a number of factors including privacy concerns, no one of which was necessarily dispositive. Id. at 99. Three of the factors the court pointed to, however, are relevant here. The court stated:

> First the 'investigation' to which the subpoena relates concerns a security matter, not one involving alleged fraud, inefficiency or waste -- the prevention of which is the Inspector General's clearest statutory charge.
>
> Second, the 'investigation' is not even ostensibly related to a general programmatic

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[16](...continued) or reasoning to support this statement, and it is unclear from the opinion whether this issue was even argued. We think the issue of whether the Inspector General of the Labor Department has general authority to investigate all federal contractors under the Davis-Bacon Act is more complex than the district court's opinion reveals.

The Davis-Bacon Act requires federal contractors to pay a minimum wage (established by reference to prevailing wages in the community). 40 U.S.C. 276(a). The Secretary of Labor is expressly given authority to conduct investigations to assure compliance with these requirements. See Reorganization Plan No. 14 of 1950, 5 U.S.C. App. In order to assure compliance with the Davis-Bacon Act, we understand the Secretary of Labor may investigate not only contractors of the Department of Labor but any federal contractor. To the extent this is true, investigations of contractors outside the Department of Labor seem akin to regulatory investigations because they are unrelated to waste and fraud in the operations of the Department of Labor itself or among its employees, contractors or grantees. Thus, there is a substantial question of whether it is appropriate for the Inspector General of the Department of Labor to conduct general investigations of Davis-Bacon Act compliance by federal contractors outside the Department of Labor. Before rendering an opinion on the scope of the authority of the IG of the Department of Labor to conduct investigations pursuant to the Davis-Bacon Act, however, we would want your views and those of the Inspector General on how this issue should be resolved in light of the general principles set out in this opinion and the specific provisions of the Davis-Bacon Act.

> review but is limited to tracking down the source of one alleged security breach.
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> . . . .
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> [In addition,] although the Inspector General is authorized to issue subpoenas to carry out all of his 'functions assigned by . . . [law],' the language of the Senate Committee Report on the 1978 Inspector General Act makes clear that in granting him subpoena power Congress was focusing upon obtaining records necessary to audit and investigate the expenditure of federal funds.

Id. While Montgomery Crisis Center involved a different type of investigation than those at issue here, the court's analysis of the Inspector General's statutory investigative authority supports the conclusions we have reached.

We also note that the legislative history of the recent amendments to the Act, Pub. L. No. 100-504, 102 Stat. 2515 (1988) to be (codified at 5 U.S.C. App.), which extended its coverage to a number of other Departments, including the Treasury Department and the Department of Justice, as well as extending the Inspector General concept to 33 other "designated federal entities," displays an understanding of the authority of the Inspector General that is fully consistent with the conclusions we have reached in this opinion. For instance, the House Report responded to concerns that extended the Act to the Department of Justice would interfere with the Department's investigative and law enforcement functions in the following language:

> A simple extension of the 1978 act to include the Department of Justice would not result in a direct and significant distortion and diffusion of the Attorney General's responsibilities to investigate, prosecute, or to institute suit when necessary to uphold Federal law. The investigation and prosecution of suspected violations of Federal law and the conduct of litigation are parts of the basic mission or program functions of the Department of Justice. The 1978 act does not authorize inspectors general to engage in program functions and, in fact specifically prohibits the assignment of such responsibilities to an inspector general.

H.R. Rep. No. 100-771, 100th Cong., 2d Sess. 9 (1988) (footnote omitted).

Similarly, the House Report described the provisions of the proposed bill (to be codified as section 8E of the Act) which extended the Inspector General concept[17] to 33 other federal entities as requiring "that multiple audit and investigative units in an agency (*except for units carrying out audits or investigations as an integral part of the program of the agency*) be consolidated into a single Office of Inspector General . . . who would report directly to the agency head and to the Congress." *Id.* at 14 (emphasis added).[18] This statement is followed almost immediately by the statement that these newly-created "inspectors general would have the same authorities and responsibilities as those provided in the 1978 act . . ." *Id.* at 15. It is also significant that a provision in the Senate bill that would have transferred to the newly-created Office of the Inspector General at the Nuclear Regulatory Commission the office that conducted the Commission's regulatory investigations was dropped after objections were raised by several Senators.[19]

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[17] The principal difference between the Inspectors General at these 33 entities and the Inspectors General in the other departments and agencies is that the former are appointed, and removable, by the head of the agency or entities rather than by the President. See 5 U.S.C. App. 8E(c).

[18] This quotation is from the Committee report describing the bill that was passed by the House, and the relevant provisions of which were adopted by the House-Senate conference and enacted into law. An earlier version of the bill introduced in the House, see 134 Cong. Rec. E458 (daily ed. Mar. 2, 1988), but never voted on, as well as the bill passed by the Senate, see 134 Cong. Rec. S414 (daily ed. Feb. 2, 1988), included a definition of the "audit units" that were to be established in the other federal establishments that tracks the quoted language in the Committee report. A comparison of the two versions of the House bill indicates that the definition was dropped as part of a simplification of the structure of the bill whereby the concept of the Inspector General was incorporated by reference rather than being defined. There is nothing in the House debates to suggest that the deletion of this definition from the earlier version of the bill was intended to have substantive effect. This is confirmed by the Conference Report which in describing the reconciliation of the relevant portions of the House and Senate bills does not indicate that the deletion of the definition of "audit unit" from the Senate bill was understood to have any substantive consequences. See 134 Cong. Rec. H9203-04 (daily ed. Sept. 30, 1988).

[19] The bill as introduced in the Senate provided for the transfer to the newly-created Office of the Inspector General at the Nuclear Regulatory Commission not only the personnel and functions of the Office of Internal Audit which performed "the

(continued...)

Finally, in light of the genuine concern expressed to us by some Inspectors General, we think it worthwhile to set out briefly the significant investigatory authority that is granted to Inspectors General under the Act. Without purporting to provide a complete description of the nature and scope of these authorities, we simply note that the Inspector General: (1) has authority to investigate recipients of federal funds, such as contractors and grantees, to determine if they are complying with federal laws and regulations,[20] and (2) can investigate the policies and actions of the Departments and their employees.[21]

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[19](...continued) typical IG functions -- that is internal audit and investigations", 134 Cong. Rec. S416 (daily ed. Feb. 2, 1988) (statement of Sen. Glenn), but also the functions of the Office of Investigations ("OI") which conducted program investigations of NRC licensees. The Senate Report described the transfer of OI to the Inspector General as "consistent" with the Act. S. Rep. No. 150, 100th Cong., 1st Sess. 18 (1987). When the bill was reported from the Committee to the full Senate, however, there was objection to the transfer of OI to the Office of the Inspector General on the ground that it would interfere with the authority of the Commission to perform its regulatory functions resulting from its loss of control of the investigative unit which conducted investigations integral to the Commission's regulatory mission. 134 Cong. Rec. S417 (daily ed. Feb. 2, 1988) As a result, the Committee Chairman, Senator Glenn, agreed to drop the transfer of OI to the Office of the Inspector General from the bill. Id.

[20] Thus, our opinion should not be understood as suggesting that the Inspector General does not have authority to conduct investigations that are external to the Department. He clearly has that authority in the case of federal contractors, grantees and other recipients of federal funds, as well as authority to investigate individuals or entities that are alleged to be involved with employees of the Department in cases involving employee misconduct or other activities involving fraud, waste and abuse. For instance, the IG would clearly be able to undertake investigations into the conduct of a corporation that paid bribes to an employee of the Department of Labor to overlook violations of OSHA regulations.

[21] The Solicitor of Labor does not challenge the exercise of such authority by the Inspector General (Letter from George Salem, Solicitor of Labor to Douglas W. Kmiec, Assistant Attorney General, Office of Legal Counsel (Dec. 5, 1988) at 2):

> [T]he Inspector General of DOL and I are in full agreement that if the IG's office has reason to believe that some sort of misfeasance

(continued...)

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[21] (...continued)
or malfeasance by DOL personnel has occurred, the IG's Office is fully authorized to investigate such possible misconduct, whether or not the investigation of a program violation is also involved. Secondly, the investigations to which this question is directed do not include any which might be directed against a recipient of funds from the Department, whether those funds have been obtained by means of lawful or unlawful activity, so long as the investigation is directed at activities which occurred in connection with the receipt or use of the DOL funds.

The Inspector General brought to our attention a 1981 letter from the Criminal Division of the Department of Justice. The letter was in response to an inquiry from the General Counsel of the Department of Health and Human Services as to the authority of the Inspector General to investigate violations of the Food and Drug Act. The relevant portion of the letter states:

> We are of the opinion that the legislation establishing the Inspectors General was generally not intended to replace the regulatory function of an agency such as FDA to investigate possible violations of the Act. However, we also feel that as part of the IG's general oversight responsibilities, he is authorized to investigate allegations of improprieties within the programs of his department or agency. Therefore, we can envision situations where FDA and/or the IG will be investigating alleged violations of the Act.

Letter from D. Lowell Jensen, Assistant Attorney General, Criminal Division to Juan A. del Real, General Counsel HHS (December 10, 1981). The Inspector General suggests that this letter supports his view that he has authority to conduct regulatory investigations. We find nothing in this letter inconsistent with our conclusion here. Like the Criminal Division in 1981, we believe that the Inspector General is authorized to investigate "allegations of improprieties within the programs of his department" and thus we too can envision situations where the Inspector General of HHS would investigate alleged violations of the Food and Drug Act. An obvious example of such a situation would be when there were allegations that employees of the Food and Drug Administration had been bribed to approve a drug for sale to the public.

Of significance here, this latter authority includes the authority to exercise "oversight" over the investigations that are integral to the programs of the Department. Thus, the Inspector General has the authority to review regulatory investigative activities of the Department of Labor, and to report his criticism and findings to the head of the department and Congress. All we conclude here is that the Act does not give the Inspector General the authority to assume these regulatory investigative responsibilities himself.

Douglas W. Kmiec
Assistant Attorney General
Office of Legal Counsel

cc: J. Brian Hyland, Inspector General
Department of Labor

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United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

February 2, 1990

Dear Inspector General

As Chairman of the Governmental Affairs Committee, I am writing to each of the presidentially appointed inspectors general for information concerning a series of vital but controversial issues. The information you provide may be crucial to the formulation of legislation being considered by this Committee.

First, for the past several years I have been increasingly concerned about reports that Inspector General (I.G.) personnel are being placed in unnecessary physical danger by carrying out their duties without law enforcement powers, including carrying firearms. Several inspector generals' offices have some statutory authority as a derivation of agency powers. In other instances, deputation of Assistant U.S. Marshals has been utilized to provide such authority. Although I.G. investigative agents utilize the same position description as agents of the Federal Bureau of Investigation, Drug Enforcement Administration, Secret Service and Bureau of Alcohol Tobacco and Firearms, senior personnel in several, but not all, of those law enforcement agencies have publicly and privately indicated their opposition to the extension of such authority to inspector general personnel. For this reason I have attached a series of questions to this letter which I hope will establish an accurate picture of whether you believe general law enforcement authorities should or should not be granted to inspector general personnel.

A. Does your agency's governing statute permit I.G. personnel to carry weapons. If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.

B. If your answer to question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?

C. If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where inspector general personnel may have been unnecessarily placed in danger as a result.

D. What additional training and expenses would be included if firearms authority was provided inspector general personnel?

E. What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)

F. It has been suggested that deputation as Assistant U.S. Marshal's may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputatation. You may wish to consider the following issues:

   1. What is the procedure for obtaining authorization for appointment as a Special Deputy U.S. Marshal for your personnel? Which officials within your agency or at the Department of Justice must approve such deputations?

   2. On average, how long does the process for reviewing requests for these appointments take?

   3. How many requests for deputation have you sent to the Department of Justice during the last year? How many have been denied? For what reasons?

   4. Is there any avenue for reconsideration of denial of a request for deputation?

5. I have been informed that "blanket authorization was granted to criminal investigators of the Department of Interior for purposes of investigating Bureau of Indian Affairs matters. Under what circumstances are such "blanket" approvals granted? How many have been requested and how many have been granted since January 1, 1990?

6. Are requests that agents be deputized ever denied by the Department of Justice even though they have been requested by the pertinent United States Attorney's Office? For what reason would the Department of Justice override the recommendation of an United States Attorney's Office?

7. How long does a Marshal's appointment last? What is the procedure for renewal of a deputation? How long does this process take?

Please feel free to provide any additional comments you may have that are not specifically called for by the questions.

Second, I am concerned about reports that audit and investigations are also impeded by the perceived or actual lack of authority to execute judicially approved search and arrest warrants. Should this power be given to inspector general personnel?

Third, I would appreciate receiving a complete description of protective services, if any, furnished by I.G. personnel for the head of your agency during the past 5 years, including some estimate of the personnel years expended on this purpose, and the authority for providing such services.

Fourth, the Committee has heard testimony from a number of inspectors general concerning the limitations the Justice Department has sought to impose on I.G. audit and investigative activities in two memorandums issued by the Office of Legal Counsel (particularly "Kmiec I" dated March 9, 1989). Please provide the Committee with any comments you may have on the impact of these memorandums on your ability to complete your mission.

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February 2, 1990

Should your staff have any questions concerning this letter, please have them contact Stephen Ryan, General Counsel, or Lorraine Lewis, Counsel, at 224-4751. I know these are issues of significant concern to each of you. I look forward to receiving your candid response.

Sincerely,

John Glenn
Chairman

JHG/smr

United States Department of State

The Inspector General

Washington, D.C. 20520

March 19, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This responds to your February 2, 1990, letter to each of the presidentially appointed Inspectors General concerning the issue of law enforcement powers for Office of Inspector General (OIG) personnel. I regret the delay in my response, which resulted from my hope that I would be able to report a favorable resolution of the impasse caused by the Kmiec opinion of last March. As noted below, however, the PCIE efforts to promote such a resolution have not been successful.

With regard to the law enforcement issue you raised, I too am deeply concerned about placing my criminal investigators in situations which may involve unnecessary physical danger. I believe that arrest and search warrant authorities should be granted without delay to OIG special agents so that they can more effectively and efficiently carry out their duty to enforce the federal criminal laws. With those important authorities would necessarily come the requirement and, I would hope, the power to carry firearms in appropriate situations.

I do not, however, see firearms authority as an end in itself and I believe that to the extent the debate has been cast in these terms it seriously undermines our position.

I am not a believer in OIG criminal investigators being "mini-FBI agents." To be sure, with respect to the State Department, there are many situations, such as those outlined below, where the ability to carry weapons would shorten the investigative process and, more important, enhance the safety of my personnel. This is not to say that it is either necessary or wise to give OIG special agents a general and all-inclusive firearms capability akin to the FBI or the DEA. Rather, I believe that general law enforcement authority by the OIGs is needed, fully warranted, and long overdue, but, especially with regard to firearms authority, these authorities should rest with the Inspector

General and be exercised sparingly on a case-by-case basis and only after a full justification.

With that said, I have attempted to answer the questions posed to me in your letter. In those situations where I have no basis to provide an answer one way or the other, I have said so. In those situations where I am in full accord with the firearms concept but question the specifics of how it will be implemented government-wide by the OIGs, I have provided my personal views of how I would handle the matter at State. There may, however, be situations in other OIGs which require a more generalized arming of the criminal investigators, and I would not want my caveats with respect to State OIG to suggest that I was addressing all OIGs with my comments. I am not. I speak here only for the State Department Office of Inspector General.

With respect to the first series of questions on law enforcement authorities, because they are so detailed, I have made my answers to those queries Addendum A of this letter. The responses to the second, third and fourth questions are set out below. Finally, I have attached as Addendum B the specific examples, as related in the law enforcement section, of situations where the need to obtain the assistance of other agencies with law enforcement authority has led to less timely and efficient investigations.

Second, I am concerned about reports that audit and investigations are also impeded by the perceived or actual lack of authority to execute judicially approved search and arrest warrants. Should this power be given to inspector general personnel?

With respect to criminal investigators, I have addressed above their need for full law enforcement authority. I do not believe that my audit staff has been impeded by the lack of law enforcement authority nor do I believe that auditors need or should have this.

Third, I would appreciate receiving a complete description of protective services, if any, furnished by I.G. personnel for the head of your agency during the past 5 years, including some estimate of the personnel years expended on this purpose, and the authority for providing such services.

The State Department OIG has no protective services responsibilities whatever. I am flatly opposed to IG's being involved in protective services for two reasons: (1) protective services are by their very nature "operational," hence, are outside the scope of an IG's legitimate oversight role; and (2) because of the unique characteristics of the protective function, it sets up a relationship between the Secretary and the IG which does not enhance, and may undermine, the latter's independence.

Fourth, the Committee has heard testimony from a number of inspectors general concerning the limitations the Justice Department has sought to impose on I.G. audit and investigative activities in two memorandums issued by the Office of Legal Counsel (particularly "Kmiec I" dated March 9, 1989). Please provide the Committee with any comments you may have on the impact of these memorandums on your ability to complete your mission.

There is no question but that the OLC opinion (Kmiec I), if it is allowed to stand, will seriously undermine the criminal investigative authority of Inspectors General and may require legislation to remedy. While the opinion purported to limit itself factually and legally to the issues at the Department of Labor, the Justice Department has taken actions since its release which strongly imply plans for a much more expansive application to the authority of IGs.

This ill-considered decision appears to attack IG investigative authority in four broad areas: (1) Fraud relating to a non-monetary federal benefit, such as a false statement on an application to obtain a federal license, certificate, job, visa, passport, or other benefit; (2) fraud in the non-payment or underpayment of funds to the government, such as an attempt to defraud an agency out of monies owed on contracts or leases; (3) fraud relating to false certifications, applications, testimony, etc., which results in unwarranted danger to public health and safety; and (4) fraud in the impersonation of an agency official or the misuse of an agency seal or logo in a way which defrauds a third party.

Most Inspectors General attach very little credence to the analysis performed or the reasoning provided in the OLC opinion and would ignore it were it not for the fact that main Justice can order United States Attorneys' Offices around the country to refuse to accept for prosecution IG cases which fall outside of the OLC parameters. Additionally, since the Justice Department defines the conditions under which it will represent Federal employees who are sued in their official capacity, it is dangerous to pursue criminal investigations in areas where there is an existing OLC opinion questioning IG authority. Should Justice decide that the conduct in dispute was outside the scope of the investigators legitimate authority, they could refuse to represent the IG employee in Court. This would have an extremely repressive effect upon OIG investigations.

From the perspective of the Inspectors General, a major fallacy in the OLC opinion is the assumption that an IG investigation of an "external party" (i.e., an investigation not involving federal employees or dollars) is somehow synonymous with a "program operating responsibility." Most IGs agree that they should not be involved in program operating responsibilities unless those duties were specifically given them under the legislation setting up the particular office. However, the IG record to date strongly suggests that there has been little or no improper IG involvement in regulatory enforcement or compliance activities and that the intervention in this area has largely been in the criminal investigative arena. This major distinction seems to have been lost on the drafter of the OLC opinion, who cannot have been knowledgeable of IG operations over the past decade.

Another major fallacy is the apparent assumption in Kmiec I that OIG special agents are akin to rogue cops who set their own investigative parameters. In fact, the OIGs cannot function in the criminal investigative area without close and continuing cooperation with the Justice Department. Our agents are dependent upon Assistant U.S. Attorneys and the Criminal Division of DOJ for all prosecutions, and for critical antecedent tools such as grand jury subpoenas and indictments. Quite literally, the Inspectors General could not perform their mandate in the investigative arena without such a relationshiip with DOJ. This is why Kmiec I has so disheartened the IG community. Of course, Kmiec cuts two ways. Last year, some 5,000 convictions obtained by DOJ nationwide resulted from OIG work; the U.S. Attorney Offices, therefore, have a large stake in resolution of the problems created by Kmiec.

I have been very actively involved in attempting to resolve the situation with the Justice Department through my role as Vice Chair of the President's Council on Integrity and Efficiency. I named a special committee of the PCIE to address the issue and to make recommendations to the full PCIE on how we might best proceed to resolve the matter. I expressed my firm conviction that we should act unanimously, if possible, and we have. The special committee reported their findings to the full PCIE in late 1989, and we have been working since that time to implement their suggested strategy.

I regret that our efforts have not yet proved successful. Our last meeting, of IGs from Interior, EPA and State with two Associate Deputy Attorneys General, was held on January 23, 1990. Subsequently, on February 22, I reminded the Deputy Attorney General about the deep concern of the IGs about this issue, and urged prompt action to resolve it. To the best of my knowledge, however, there has been no forward motion since then.

My strong personal impression is that many DOJ officials, particularly in the Criminal Division and in the U.S. Attorney Offices, feel that Kmiec was too sweeping in its implications, that it should not have been stated or interpreted in terms beyond its Department of Labor predicate, and that many senior officials in the Department would welcome a graceful way of extricating itself from the resulting dilemma. As yet, unfortunately, that has not yet occurred. I suspect that if this is to happen at all, it will have to come from a meeting at the Dornan-Thornburgh level (which is a distinct possibility) or, absent that, through legislation.

Sincerely,

Sherman M. Funk

ADDENDUM A

A. Does your agency's governing statute permit I.G. personnel to carry weapons? If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.

There is no State Department statute or internal regulation which specifically permits criminal investigators in the Inspector General's Office (OIG) to carry firearms. However, Title 22 U.S.C. § 2709 provides general law enforcement authorities, such as arrest, search warrant and firearms, to "special agents of the Department of State and the Foreign Service" in the conduct of investigations relating to illegal passport or visa issuance or use. Agents of the Bureau of Diplomatic Security (DS) carry firearms under this grant of authority.

Although OIG criminal investigators conduct investigations of illegal passport and visa issuance and use, often working these jointly with DS, they have no arrest, search warrant or firearms authority. In those situations where we believe that the lives of our agents are at risk in carrying out a particular investigation, we have been requesting the Department of Justice (DOJ) to appoint them as Special Deputy United States Marshals.

B. If your answer to question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?

Despite the fact that we presently have no general firearms authority, all OIG special agents are required to attend and successfully complete the criminal investigator course at the Federal Law Enforcement Training Center (FLETC) or similar basic law enforcement training such as the FBI Academy. About 80 percent of our criminal investigators were previously employed by traditional law enforcement agencies which have full firearms authority and which require extensive firearms training.

Additionally, to address the issue of firearms training for those agents who have been appointed Special Deputy U. S. Marshals, I have provided the Office of Investigations with the following directive:

> I want to be sure that any OIG employee who is authorized to carry firearms is qualified under State Department (DS) weapons certification standards, and requalifies as appropriate, i.e., at least every six months. This requirement applies even though the

> agents concerned may have qualified previously in other law enforcement agencies. There will be no exceptions.

As a result of this directive, 26 OIG special agents satisfactorily completed the Bureau of Diplomatic Security's one-week firearms training course at Newington, Virginia. Before any agent is permitted to carry a firearm in the performance of his official duties, the agent must successfully complete this training.

OIG/INV special agent authority to carry a firearm is currently limited to specific duties granted as a Special Deputy U.S. Marshal, and further limited to the specific criminal investigation in which the request was made. Therefore, we have been faced with situations in which agents deputized for a particular investigation have been unable to assist OIG agents deputized in another investigation without first requesting DOJ approval for deputation in the new investigation.

I believe that arrest and search warrant authorities are necessary tools in the arsenal of federal criminal investigators who are tasked with enforcing the laws of the United States. Firearms authority is a concomitant power necessarily associated with the arrest and search warrant capabilities if those important tasks are to be accomplished effectively and safely. However, it is my view that firearms authority in the OIGs should be sparingly utilized, under the direct control of the Inspector General, and in accordance with regulations promulgated by the Attorney General.

C. If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where inspector general personnel may have been unnecessarily placed in danger as a result.

Our inability to carry firearms has in some situations delayed the timely completion of investigations by forcing us to request scarce manpower from other law enforcement agencies for relatively routine arrest and search warrant activities. As previously mentioned, in the absence of a specific delegation of authority from the Attorney General to carry firearms through U.S. Marshal deputation, it is not possible for OIG criminal investigators to conduct searches or to make arrests. In any case, I will not permit my agents, even if they had arrest and search warrant authority, to exercise either unless they carried weapons as a back-up. It simply would put them unnecessarily in harm's way. The result, of course, is that we can accomplish these routine activities only after lengthy coordination with other federal agencies who are also often strapped, not only with scarce resource problems, but also with conflicting investigative priorities.

Our need for full law enforcement authority becomes increasingly critical. Many of our passport and visa fraud cases involve either known international narcotics traffickers or the distinct possibility of such involvement. Also, because so much of our work is conducted overseas, and because of the ubiquity of narcotics traffickers abroad, my agents increasingly encounter the latter in fraud cases unrelated to passports and visas. Law enforcement agencies dealing with potential violent offenders are reluctant to work with, and at times, have even refused to cooperate with, OIG investigators because our lack of firearms authority poses special dangers to the other investigators.

In other situations, as noted above, costly and lengthy investigations were made more so because of the delay and difficulty associated with obtaining the assistance of those federal entities having full law enforcement authority. Addendum B provides examples which highlight this problem.

D. What additional training and expenses would be included if firearms authority was provided inspector general personnel?

Very little additional training and expense would be incurred if firearms authority were provided OIG personnel. As previously mentioned, all OIG Special Agents are presently required to successfully complete basic firearms training through FLETC. In addition, I have imposed the further requirement of successful completion of a Bureau of Diplomatic Security one-week firearms training program and appropriate requalification prior to the exercise by my investigators of special deputation authority. Looking strictly from the expense standpoint, minimal additional expenses would be incurred after the initial purchase of firearms and related equipment. If adequate stocks of firearms equipment already exist in the State Department, then we may be able to obtain the weapons without additional expense.

E. What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)

My guidelines on the use of firearms would generally mirror the current policies of federal agencies conducting criminal investigations in the continental United States, but would be more stringent. The normal or routine policy on firearms is to issue them for the purposes of protecting lives of law enforcement personnel, as well as others, in the course of enforcing federal laws. This would include, of course, conducting searches and making arrests. IG investigators who are not involved in the type of inherently dangerous investigative activity described above would not be authorized to carry firearms absent some other compelling justification. Additionally, IG investigators would require explicit Inspector General approval to carry firearms on a particular case and then only when the specific circumstances warrant. I do not now, nor will I, authorize the off-duty carrying of weapons.

F. It has been suggested that deputation as Assistant U.S. Marshal's may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation. You may wish to consider the following issues:

1. What is the procedure for obtaining authorization for appointment as a Special Deputy U.S. Marshal for your personnel? Which officials within your agency or at the Department of Justice must approve such deputations?

Before a special agent obtains authorization for appointment as a Special Deputy U.S. Marshal, the agent must provide detailed justification and follow rigid guidelines instituted by the Deputy Attorney General. These guidelines require that the anticipated investigative procedures for which deputation is requested are (1) hazardous to the life or physical safety of a criminal investigator or a cooperating witness; (2) necessary for the successful completion of the federal investigation; and (3) not capable of performance by another law enforcement agency with firearms and arrest powers.

The initial deputation request is processed through several layers of management within the OIG including various supervisors within the Office of Investigations, specifically the case supervisor, the Division Director, the Deputy Assistant Inspector General for Investigations and the Assistant Inspector General for Investigations. After the request is approved by the Office of Investigations, it must be reviewed by the Counsel to the Inspector General. After those reviews and approvals, the deputation request is evaluated by the Inspector General himself and signed, if appropriate.

Once the correspondence is signed by the Inspector General, it is directed to the Criminal Division of the United States Department of Justice, to the attention of the Deputy Assistant Attorney General (DAAG). The DAAG ensures that the request for deputation is forwarded for review either to the appropriate office within the Criminal Division or transmitted to other Justice Department components outside the Criminal Division in situations where a particular investigation pertains to subject matters not overseen by the Criminal Division.

The Office of Enforcement Operations (OEO) of the Criminal Division also reviews all OIG deputation requests for form and substance and is quite aggressive in ensuring that the appropriate statutory authorities are cited. If OEO does not believe that the investigation is within the purview of the particular OIG they can recommend rejection of the request on that basis alone.

After review by the DAAG and OEO the request is sent to the office of the Deputy Attorney General where it is reviewed by an Associate Deputy Attorney General a final time and a recommendation of approval or disapproval made to the Deputy Attorney General. The Deputy Attorney General then forwards his decision to the United States Marshals Service which implements the deputation or disapproves it depending upon the recommendation.

Additionally, the OIG Special Agent ensures that Justice Department attorneys assisting in the investigation are fully apprised of any request that particular agents be appointed as special deputy United States Marshals and of the anticipated investigative procedures which will be cited as justification for the desired deputation. Our requests for deputation are made only with the specific approval of the Justice Department attorney assigned to the investigation. The Criminal Division also requests the attorney assigned to the investigation to justify in writing the OIG request for deputation.

2. On average, how long does the process for reviewing requests for these appointments take?

The duration of the requests and approval varies from a period of months to a singular emergency situation that was accomplished in several days. The emergency request, however, required that all the same administrative requirements be met. The approval had to be made by officials of the Justice Department and only after the request and justification had been submitted formally in writing. The deputation approval process is generally long and cumbersome and entails many hours of OIG and DOJ time which could more effectively be utilized conducting investigations and pursuing other important issues.

3. How many requests for deputation have you sent to the Department of Justice during the last year? How many have been denied? For what reasons?

In the past twelve months we have requested six deputations. All were approved.

4. Is there any avenue for reconsideration of denial of a request for deputation?

Because we have not yet had a deputation request denied, we have not had an opportunity to explore the issue of an appeal of a denial.

5. I have been informed that "blanket authorization was granted to criminal investigators of the Department of Interior for purposes of investigating Bureau of Indian Affairs matters. Under what circumstances are such "blanket" approvals granted? How many have been requested and how many have been granted since January 1, 1990?

I understand that a similar blanket authorization was provided to Department of Justice OIG agents. However, we have no specific information about how the Justice Department determined that its own IG's office required firearms authority while others did not.

6. Are requests that agents be deputized ever denied by the Department of Justice even though they have been requested by the pertinent United States Attorney's Office? For what reason would the Department of Justice override the recommendation of an United States Attorney's Office?

In the one emergency situation previously referred to, it was necessary to obtain separate DOJ approval for deputation despite the fact that the agents seeking approval had already been deputized in an earlier investigation and their "commissions" or "authorities" had not yet expired. DOJ insisted that each deputation had to be approved separately, and the fact that agents had already been deputized and sworn in as Deputy U.S. Marshals in one case would not enable them to carry firearms and make arrests in another one.

Our office has not been faced with a situation in which an Assistant United States Attorney requested deputation for an agent and the Criminal Division recommended disapproval. However, it is obvious that the approval of an AUSA is not the sine qua non of DOJ approval since it is only the first step in a many step review and approval process and is by no means the most important one.

7. How long does a Marshal's appointment last? What is the procedure for renewal of a deputation? How long does this process take?

Special Deputy U.S. Marshal appointments have varied in length for each of our requests because all special deputations expire on the June 30th after they were granted. In one situation, we received special deputation at or about the time it was to expire and our request had to have an addendum requesting an extension. For example, any special deputations approved during February 1990, would expire on June 30, 1990, irrespective of whether the investigation was completed. A memorandum would then have to be submitted explaining why it was appropriate to extend the special deputation authority.

ADDENDUM B

United States Department of State
Office of Inspector General

Need For Full Law Enforcement Authority

Dealings with known violent criminals; Protection of witnesses; Locating and interviewing subjects in unsafe areas.

Location and Date of Event

Houston, Texas, and Miami, Florida - Actively under investigation

Description of Event

This case involves the issuance of fraudulent U.S. Passports to known major narcotics traffickers. These same individuals have previous arrest records and have been involved in acts of violence. OIG Special Agents, while working in the Miami area were cautioned by INS Special Agents not to attempt to contact certain individuals who were residing in high risk areas of the city. INS assigned an armed Special Agent to accompany the OIG Special Agents as a protective measure.

Solution

If OIG Special Agents had full law enforcement authority they would eliminate the potential risk of personal injury when engaged in the foregoing type of investigation. Further it would allow these Agents to operate more freely , in a timely manner, and allow, as in this case, an INS Agent to perform his Agency's primary investigative responsibilities.

Agency File Number: 85-220

United States Department of State
Office of Inspector General

Need For Full Law Enforcement Authority

Surveillance of suspect in unsafe areas.

Location and Date of Event

April 1988 - S.E. Washington, D.C.

Description of Event

Surveillance of subject residence and GOV during hours of darkness in one of the highest crime areas in the nation.

Solution

If OIG Special Agents had law enforcement authority they could protect themselves.

Agency File Number: 88-020

United States Department of State
Office of Inspector General

Need for Full Law Enforcement Authority

Execute arrest warrant

Location and Date of Event

San Diego, California - February 26, 1988

Description of Event

In a case involving the theft of approximately $75,000.00 of State Department funds, the subject was indicted by a Federal Grand Jury and a bench warrant issued for the subject's arrest. The arrest could not be made by the OIG/INV, since it did not have arrest authority and another law enforcement agency had to become involved. This created significant delays in locating and effecting the arrest.

Solution

If OIG Special Agents had arrest authority the matter could have been resolved promptly and more efficiently.

Agency File Number: 86-151

United States Department of State
Office of Inspector General

Need For Full Law Enforcement Authority

Locating and interviewing subjects and witnesses in unsafe areas; Dealings with known violent criminals; Protection of witnesses. United States Marshal deputization authority used.

Location and Date of Event

San Diego, California - Actively under investigation

Description of Event

In a case involving Visa fraud, some of the subjects are known narcotics traffickers or otherwise engaged in illegal border crossing activities. The U.S. Department of Justice has determined the need for U.S. Marshal deputization authority due to the proclivity for violence associated with the subjects.

Solution

If OIG Special Agents had full law enforcement authority it would eliminate the need for special deputation and the Agents could be more responsive to case developments.

Agency File Number: 85-069

United States Department of State
Office of Inspector General

Need for Full Law Enforcement Authority

Locating and interviewing subjects in unsafe areas.

Location and Date of Event

Elizabeth, NJ and Newark, NJ - January 26, 1989

Description of Event

This case involved an alleged Filipino smuggling ring operating in Manila and various sections of the U.S.A. According to sources, an illegal alien residing in Elizabeth, New Jersey, purchased travel documents for her illegal entry from this ring, with the assistance of a contact employed by the AmEmbassy - Manila.

Contact was initiated with INS and a date was scheduled to interview this witness at her residence. When the OIG agent arrived at the INS Field Office, the agent' supervisor reversed his prior decision and refused assistance. The OIG agent was then referred to another INS unit who initially was reluctant to provide assistance because the OIG agent did not have the authority to carry a firearm.

After a two day delay, the witness was picked up by OIG and INS agents and a sworn statement was obtained, detailing important information on the smuggling ring's activities and its associates.

Agency File Number: 88-085

United States Department of State
Office of Inspector General

Need for Full Law Enforcement Authority

Undercover Operation; Protection of witnesses; Make warrantless arrest; Locating and interviewing subjects in unsafe areas; Prevent loss of evidence; Use of consensual monitoring techniques.

Location and Date of Event

Los Angeles, California - Actively under investigation

Description of Event

This case involves a known visa broker who has been involved in the fraudulent sale of passports and visas to aliens. An OIG agent, acting in an undercover capacity, has been approached by this individual and offered substantial sums of money for bonafide U.S. travel documents.

During the course of this investigation, OIG agents were cautioned by State security agents not to attempt contacts residing in high risk areas of the city. This restriction, combined with our need to protect our undercover agent and the potential loss of evidence, required the participation of other law enforcement agencies. Due to the rapidly changing nature of the operation it proved extremely difficult to obtain and coordinate assistance from other law enforcement agencies because of the amount of time the operation required and the inability/inflexibility of these agencies (by no fault of their own) to change their own established priorities and responsibilities. [For instance, INS agents involved in an anti-smuggling operation, who were involved with our case from the start, were called out to arrest 150 aliens in a smuggling bust over the same three day holiday weekend our OIG buy/bust was scheduled.]

Subsequently, at the most critical stage of the operation, another agency had to be called in for assistance. In addition to having to deal with the ever changing nuances of the case and the idiosyncracies of the target, OIG agents were placed at the mercy of this agency's own bureaucracy and limited ability to provide adequate resources. While enthusiastic and earnest, the agents involved were nevertheless, the least familiar with the case despite numerous briefings. In the end, they deviated from their own (arrest) operational plan and the target escaped.

Solution

If OIG Special Agents had full law enforcement authority they would eliminate the potential risk of personal injury to themselves and witnesses; it would allow these agents to operate more fully, in a timely, effective manner; would reduce to a very high degree OIG dependance or other law enforcement agencies, and free these agents to perform their agency's primary investigative responsibilities.

Agency File Number: 88-116

United States Department of State
Office of Inspector General

Need For Full Law Enforcement Authority

Execute a search warrant

Location and Date of Event

Springfield, Virginia - August 31, 1988

Description of Event

In a case involving the arrest of two individuals and the subsequent consent search of their vehicle by Washington Metropolitan Police, six official U.S. Passports, three of which were blank, a dry seal U.S. Embassy Tripoli embosser, and a phoney authorization to carry firearms permit as an Investigator with the DipSec of the U.S. Department of State were recovered. Subsequent investigation disclosed that one of the arrested individuals was a contract employee at the U.S. Department of State, who worked in the classified waste burn section of Main State and had access to thousands of blank or partially completed official U.S. Passports and classified documents. Investigation also disclosed that the indivdual was a heavy purchaser of firearms. A search warrant was obtained for the individual's home. The search was executed at night due to the exigent circumstances of this matter with Special Agents from the FBI and Office of Diplomatic Security. The Special Agent with this office participated fully in this entire matter and was the only law enforcement agent present without a firearm. Several persons were found staying at this residence. The potential risk to the OIG's Special Agent and his inability to effectively assist other Special Agents should a life threatening situation have developed in this ultrahazardous situation could have been reduced with appropriate authority.

Solution

If OIG Special Agents had full law enforcement authority they would eliminate the potential risk of personal injury when engaged in the foregoing type of investigation. Furthermore, it would allow agents to operate more freely, and in a timely and effective manner.

Agency File Number: 88-180

United States Department of State
Office of Inspector General

Need for Full Law Enforcement Authority

Dealings with known violent criminals; Locating and interviewing subjects in unsafe areas.

Location and Date of Event

Miami/Liberty City, Florida - April 12-15, 1988

Description of Event

This case involved the theft of personal property from a field office evidence/property safe. Investigation revealed that a former clerk typist, arrested for armed robbery of a convenience store in Ft. Lauderdale, stole the cash and other valuables. The investigation required numerous interviews, in unsafe areas of Miami, of individuals with previous arrest records who have been involved in acts of violence. If not for the assistance of the Broward County Sheriff's office, OIG would not have been able to proceed with this investigation.

Solution

If OIG Special Agents had full law enforcement authority they would eliminate the potential risk of personal injury when engaged in the foregoing type of investigation. Furthermore, it would allow agents to operate more freely, and in a timely and effective manner.

Agency File Number: 88-085

DEPARTMENT OF THE TREASURY
WASHINGTON

SPECTOR GENERAL

March 5, 1990

The Honorable John Glenn
Chairman
Senate Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This responds to your letter of February 2, 1990, requesting information regarding the law enforcement authority and activities of the Treasury Department Office of Inspector General (OIG).

A. Does your agency's governing statute permit OIG personnel to carry weapons? If your answer is yes, please specify and attach a copy of the statute, agency directive, or other description of authority.

Answer: Treasury OIG personnel have no statutory authority to carry weapons.

B. Not applicable.

C. If you lack firearms authority, please describe any problems this has caused in performing your mission. Please provide any specific instances where OIG personnel may have been unnecessarily placed in danger as a result.

Answer: The OIG has experienced several problems due to a lack of firearms authority. Specific instances where OIG personnel have been unnecessarily placed in danger as a result are enclosed with this letter.

D. What additional training and expenses would be included if firearms authority was provided OIG personnel?

Answer: All entry-level agents are sent to the Federal Law Enforcement Training Center (FLETC) where firearms training has been and will be a mandatory part of the curriculum. If firearms authority were provided OIG personnel, additional expenses would be incurred to provide equipment, (ammunition, sidearms, holsters, handcuffs, etc.). In addition to basic firearms training for all agents, regularly scheduled requalification, semi-annually or annually would become a necessary part and expense of the OIG training program.

E. What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)

Answer: We would adopt firearms policies consistent with those at the Treasury law enforcement bureaus as well as with the uniform Federal firearms procedures. We do not currently envision restrictions based on an agent's determination of the danger inherent in any upcoming event or situation.

F. It has been suggested that deputation as Assistant U.S. Marshals may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation. You may wish to consider the following issues:

1. What is the procedure for obtaining authorization for appointment as a Special Deputy U.S. Marshal for your personnel? Which officials within your agency or at the Department of Justice must approve such deputations?

Answer: The Assistant Inspector General for Investigations makes a written request for deputation, which is approved by the Inspector General (IG), and forwarded to the Department of Justice.

2. On average, how long does the process for reviewing requests for these appointments take?

Answer: We have not had any recent experience with requesting deputation, however we understand from others in the IG community that it usually takes from 2 to 4 months.

3. How many requests for deputation have you sent to the Department of Justice during the last year? How many have been denied? For what reasons?

Answer: We have not sent any requests to the Department of Justice during the last year.

4. Is there any avenue for reconsideration of a denial of a request for deputation?

Answer: We have not had any experience with a denial.

5. I have been informed that "blanket" authorization was granted to criminal investigators of the Department of Interior for purposes of investigating Bureau of Indian Affairs matters. Under what circumstances are such "blanket" approvals granted? How many have been requested and how many have been granted since January 1, 1990?

Answer: We have had no experience with requests for "blanket" approvals.

6. Are requests that agents be deputized ever denied by the Department of Justice even though they have been requested by the pertinent U.S. Attorney's Office? For what reason would the Department of Justice override the recommendation of a U.S. Attorney's Office?

Answer: Again, we have had no experience with a denial of a request for deputation.

7. How long does a Marshal's appointment last? What is the procedure for renewal of deputation? How long does this process take?

Answer: There is no set term for an appointment. However, all appointments must be renewed on June 30 of each year. We have had no experience with a request for renewal of deputation.

With regard to your second issue, you are concerned about reports that audits and investigations are impeded by the perceived or actual lack of authority to execute judicially approved search and arrest warrants. You ask whether this power should be given to OIG personnel.

In my view, OIG personnel should be given the full panoply of law enforcement powers, including the authority to make arrests and execute search warrants. One important reason is that the general public perceives that anyone wearing a badge has full law enforcement authority. If we send OIG investigators into the street to conduct investigations with only partial powers, this could endanger their lives, hinder their ability to protect themselves, and impede the conduct of audits and investigations.

With regard to your third issue, the Treasury OIG has not provided the Secretary of the Treasury with any protective services.

With regard to your fourth issue, you ask whether the Department of Justice's attempt to limit OIG activities has had any impact on our ability to complete our mission. The Justice position has had no impact on our ability to complete the OIG mission.

I hope this information is helfpul to you.

Yours truly,

Donald E. Kirkendall

Donald E. Kirkendall
Inspector General

Enclosures

United States Department
of the Treasury
Office of Inspector General

Need For Full Law Enforcement Authority

Execute arrest warrant

Location and Date of Event

Glynco, Georgia - May 12, 1988

Description of Event

In a case involving four individuals charged with theft and possession of stolen property, arrest warrants were obtained. Although the items were property of the Federal Law Enforcement Center, and the Department of the Treasury Inspector General office exercised full jurisdiction, agents of this office could not make arrest since we do not have full law enforcement powers. Therefore, officers of the Glynn County Police Department executed the four arrest warrants which required additional coordination and delay.

Solution

If the OIG special agents had full enforcement authority they could have executed the arrest, assuring the arrest procedures conformed to Federal guidelines. In addition, the warrants would have been served sooner.

United States Department
of the Treasury
Office of Inspector General

Need For Full Law Enforcement Authority

Assault on a special agent

Location and Date of Event

Washington, D.C. - September 22, 1987

Description of Event

In a case involving travel voucher fraud, the subject of the investigation consented to submit to a polygraph examination. During the pre-test interview and completion of paperwork, the subject jumped from his seat protesting the charges against him. After some explaining, the case agent was able to calm the subject. A few moments later, while being advised of his rights, the subject again jumped to his feet using abusive and obscene language and threatening the agent with civil suits. Then the subject shoved the examining agent in the chest.

This subject was described by several witnesses in the case as being unstable, volatile, and short tempered.

Solution

If OIG special agents had arrest authority, this situation might have ended in arrest, had the circumstances been more aggravated.

United States Department
of the Treasury
Office of Inspector General

Need For Full Law Enforcement Authority

Execute arrest warrant

Location and Date of Event

Washington, D.C. - June 23, 1988

Description of Event

In a case involving a theft of approximately $600 from a Treasury imprest fund, the subject employee confessed to stealing the missing funds.

The OIG obtained a warrant for the subject's arrest. However, because the OIG agents do not have powers of arrest, written request to another Treasury law enforcement bureau was needed to arrange for agents with powers of arrest to assist the OIG. Due to time constraints, it was decided that the OIG would request the assistance of the local police department. After a significant amount of explaining why the OIG needed their assistance, the arrest was effected by the local police officers without incident.

Solution

If OIG special agents had arrest authority, much time and, therefore, taxpayer's money, would be saved by not having to seek outside assistance.

United States Department
of the Treasury
Office of Inspector General

Need For Full Law Enforcement Authority

Execute search warrant

Location and Date of Event

Washington, D.C. - September 1986.

Description of Event

During an investigation into the theft of a substantial supply of U.S. Government property, OIG special agents obtained a search warrant for a location allegedly being utilized to traffic in stolen U.S. Government property. But because the OIG agents did not have law enforcement authority, questions arose almost immediately regarding their lawful authority to execute the search warrant. For that reason, coupled with their lack of authority to carry firearms with which to protect themselves, the execution of the warrant was delayed until assistance could be obtained from the U.S. Secret Service.

Solution

Had the OIG special agents possessed law enforcement authority, an unnecessary delay and utilization of another's resources could have been avoided.

United States
Department of the Treasury
Office of Inspector General

Need For Full Law Enforcement Authority

Locating and interviewing suspects in unsafe areas

Location and Date of Event

Washington, D.C. - ongoing

Description of Event

During an investigation of missing mutilated currency from the Treasury Annex Mailroom, it was determined that a former mail clerk was a likely suspect in the currency theft. The mail clerk was previously convicted and served time for theft of credit cards while employed by FMS. The suspect is no longer employed by the Government. He resides in a southeast Washington, D.C., apartment. The Crimes Analysis Unit, Metropolitan Police Department (MPD), was contacted regarding the atmosphere of the neighborhood prior to any attempts to interview the suspect. A representative of the unit advised that the location is a major "open air drug market" and that a turf war is on going with Jamaican nationals moving in on the turf in large numbers. The MPD representative said at least four agents should be present if an attempt is made to interview the suspect. He also said the agents should be armed as a precaution.

Solution

If OIG agents had the authority to carry weapons, it would afford them the protection they need when attempting to locate and interview suspects in unsafe areas.

United States Department
of the Treasury
Office of Inspector General

Need For Full Law Enforcement Authority

Execute arrest warrant

Location and Date of Event

Glynco, Georgia - October 27, 1987

Description of Event

In an investigation involving the use and distribution of illegal drugs at the Federal Law Enforcement Training Center, it became necessary for an OIG special agent to request deputization authority. The request was based on the possibility of the execution of one or more arrest warrants. In addition, due to the nature of the case, two agents from the Drug Enforcement Administration (DEA) were required.

Solution

If OIG Special Agents had full law enforcement authority there would be no need to request the deputization authority. Also, the case could have been investigated without the assistance of DEA if the OIG had full law enforcement authority.

United States Department
of the Treasury
Office of Inspector General

Need For Full Law Enforcement Authority

Execute search warrant

Location and Date of Event

Brunswick, Georgia - May 3 to 4, 1988

Description of Event

In an investigation involving the theft and sale of property belonging to the Federal Law Enforcement Center, approximately seven consent searches were executed on residences in the Brunswick area. The recovered property value was in excess of $11,000.00.

Due to the Office of the Inspector General not having full enforcement authority, agents of this office could not participate in the searches. Officers of the Glynn County Police Department conducted these searches. This required additional coordination.

Solution

If OIG special agents had full enforcement authority, they could have executed these searches assuring that proper procedures under Federal law were followed in obtaining the evidence.

United States Department
of the Treasury
Office of Inspector General

Need For Full Law Enforcement Authority

Investigating subject suspected of drug abuse and violence

Location and Date of Event

Washington, D.C., throughout investigation
(September 88 - September 89)

Description of Event

During an investigation involving administrative violations, information surfaced regarding the subjects' alleged drug use and involvement in killing a transvestive prostitute. Subject was verbally hostile to agents during investigation. Even in "administrative" cases, agents must come face to face with potentially violent individuals, and have no way of protecting themselves.

Solution

Treasury OIG special agents need the authority to carry firearms for self-protection.

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884

MAR 5 1990

Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20520-6250

Dear Mr. Chairman:

Thank you for your letter of February 2, 1990, that requested information pertaining to the formulation of pending legislation which would provide additional law enforcement authority to Inspectors General. Tab A contains our responses to the questions addressed in your letter and also indicates the additional documents provided for your information.

I believe that general law enforcement authority should be granted to the criminal investigators within the offices of the statutory Inspectors General. I share your concern that Inspector General personnel are being placed in unnecessary physical danger by performing their duties without full law enforcement powers, including authorization to carry firearms and execute search warrants.

Thank you for the opportunity to provide the information. I hope it will be helpful to you and the members of your Committee. If I can be of further assistance, please contact me or Mr. Morris B. Silverstein, the Assistant Inspector General for Criminal Investigations Policy and Oversight, at (202) 694-1234.

Sincerely,

Susan J. Crawford

Susan J. Crawford
Inspector General

Enclosures

cc: Honorable William V. Roth, Jr.
Ranking Republican

Response to Senator Glenn's Questions Regarding Legislation that Would Provide Additional Law Enforcement Authority

Firearms Authority

Inspector General, Department of Defense (IG, DoD), personnel engaged in law enforcement activities are authorized to carry firearms pursuant to Title 10, United States Code (USC), Section 1585 (Tab B) as implemented by DoD Directive 5210.66, "Carrying of Firearms by Department of Defense Personnel," dated March 17, 1986. Issues pertaining to the use of force are contained in DoD Directive 5210.56, "Use of Force by Personnel Engaged in Law Enforcement and Security Duties," as amended, January 16, 1987. The Directives are contained in the enclosed report (Tab C) issued by the Assistant Inspector General for Criminal Investigations Policy and Oversight in August 1988. The report contains the results of our review of the policies and procedures regarding weapons and use of force by the Defense Criminal Investigative Organizations.

Firearms training is provided to investigators of the DCIS, the investigative arm of the IG, DoD in accordance with Chapter 38 (Tab D) of the Defense Criminal Investigative Service (DCIS) Agent's Manual. The criminal investigators complete an approved firearms training course, and qualify to Federal Law Enforcement Training Center standards, and are required to requalify quarterly in order to carry firearms.

The criminal investigators are authorized to carry firearms, in accordance with Chapter 38, Section 3803, of the DCIS Agent's Manual, while traveling to and from work, on duty, and when off-duty as circumstances warrant, i.e., performing "duty agent" or other on-call services. The authority to carry firearms is viewed as being essential to the safety of our personnel and, therefore, critical to our successful completion of the IG law enforcement mission.

Deputization by USMS

In the past, the DCIS has requested deputation as Special Deputy United States Marshals. For example, in 1989 we submitted deputization requests for 14 criminal investigators in three criminal investigations. Of those, six have been approved and eight are still pending. Generally, it takes approximately four to six months to process our deputization requests.

Deputization requests for DCIS have been made on a case-by-case basis and in accordance with the general procedures outlined in the May 8, 1989 letter (Tab E) from Acting Associate Attorney General, Joe D. Whitley, as implemented by a DCIS memorandum dated May 26, 1989 (Tab F). This office has neither sought nor obtained blanket authorization for DCIS agents.

After deputization takes place, appointments are valid for a six month period and only in conjunction with a specific investigation. Renewals may be obtained in accordance with the procedures provided by the Department of Justice. Renewal requests do not take as long to process as the original deputization requests. We initiate renewal requests about six weeks prior to the expiration of the appointment. This has proved to be sufficient to ensure continuity in deputization coverage.

Although the majority of criminal investigations conducted by the DCIS involve nonviolent criminal acts (procurement fraud and related offenses), the criminal investigators conduct investigations and employ a number of investigative techniques, including search warrants, consensual monitoring, and undercover operations, which involve an element of risk to their personal safety. The decision to use those investigative procedures in a given investigation is often dictated by recent developments not always known sufficiently in advance to obtain deputation.

Furthermore, when the investigative procedure may be hazardous to the life or safety of the criminal investigator or a cooperating witness, if the other Department of Justice criterion for obtaining deputation are not satisfied, deputization will not be granted. Full law enforcement powers, including arrest authority, would eliminate the unnecessary physical danger associated with those instances when deputization is not reasonably available.

Arrest and Search Warrant Authority

In response to your concern that investigations are impeded by the lack of authority to execute judicially approved search and arrest warrants, this office does not have the authority to make arrests, but does have the authority to seek and execute search warrants. See Criminal Investigations Policy Memorandum Number 6 - Requesting, Serving and Executing Search Warrants, dated January 4, 1985 (Tab G). In 1989, the DCIS executed 62 search warrants. However, all of these warrants were executed in conjunction with other Federal, state or local law enforcement agencies because this office lacks full arrest authority.

In joint investigations involving other Federal law enforcement agencies with full law enforcement powers (primarily the FBI), the DCIS lack of arrest authority does not pose a serious problem. The other agencies are typically available to make arrests. However, the DCIS has conducted several investigations which were not joint in which DCIS had to request the assistance of these other agencies in order to properly conduct searches and execute arrest warrants. We are unaware of any particular investigation which has been adversely affected by a lack of arrest authority, however, some investigative actions, including searches, have been delayed while attempts have been made to obtain assistance from state, local, or other Federal law enforcement agencies with full law enforcement powers.

In criminal investigations where a search warrant has been obtained, the timing of the search can be critical to the successful seizure of the evidence covered by the warrant. Although many searches can be fully coordinated with the necessary participants before evidence is lost or destroyed, that will not always be the case, especially when there is only a very narrow window of opportunity in which to conduct the search. In these short notice situations the other law enforcement agency may not be available when needed.

Testimonial Subpoena Authority

Testimonial subpoena authority is a matter of concern to this office. The Congress has provided Federal agencies with a number of remedies to redress instances of fraud in the procurement process. However, those remedies are effective only if sufficient information is gathered to warrant and support their use.

Presently, our subpoena authority extends only to documents. Collecting a mass of documents is not always enough without witness testimony to establish their relevance to the matter being investigated. As you are aware, not all of our fraud cases are accepted for criminal prosecution. The Grand Jury may not be used solely to gather evidence and obtain testimony to pursue civil, administrative, or contractual remedies. In order to effectively support these remedies through our investigations, testimonial subpoena authority would be most helpful.

The Congress has granted testimonial subpoena authority to compel testimony in administrative investigations in about 69 different statutes. Testimonial subpoena authority is authorized for use by other agencies in investigations (e.g., under the "Potato Research and Promotion Act," "Cost Saving Act"--(the bumper standards law), and investigative hearings relating to the reasonableness of bridge tolls (33 USC 506)). A position paper which discusses testimonial subpoena authority for this office is enclosed (Tab H).

Protective Service Missions

You also requested a complete description of protective service missions (PSM) furnished by IG personnel for the past five years. The DCIS does not presently have a personnel security mission nor does it have criminal investigators assigned to personal security officer duties. However, protective services are provided by the military criminal investigative organizations (MCIOs). The PSM conducted by the MCIOs provide protection for a wide array of both DoD and non-DoD personnel.

We and the Office of General Counsel, DoD, are concerned that the PSM are being conducted by the MCIOs without adequate statutory authority. The DoD does not currently possess any statutory authority to conduct PSM for DoD officials, or guests of the Department away from military bases. We believe that DoD needs specific legislative authority for such operations, to include statutory arrest authority for DoD personnel providing those services. Without such specified statutory authority, PSM provided by the MCIOs may violate the Posse Comitatus Act (18 USC 1385).

The Secretary of Defense is protected by a full-time detail provided by the United States Army Criminal Investigation Command (USACIDC). He is one of the many DoD and Army officials who are provided protective services by the USACIDC. The USACIDC has increasingly had to commit scarce resources to PSM having expended from a low of 43 staff-years in fiscal year (FY) 1985 to 69.6 staff-years in FY 1988.

The Naval Investigative Service Command (NIS) provides protective services to the Secretary of the Navy and other Navy officials based on actual threats. The NIS expended a low in FY 1985 of 11.4 staff-years to a high of 71.8 staff-years (125,501 hours) in FY 1986 for its personnel security missions. In FY 1989, the NIS expended 33.4 staff-years but, on average, the past five fiscal years has shown a median of 35.18 staff-years.

The Air Force Office of Special Investigations (OSI) provides protective services for the Secretary of the Air Force and other dignitaries. The protection is provided based on actual threats received, much the same as the NIS. The OSI performed between 250 and 300 PSM missions in FY 1989, which expended 45,000 staff-hours or about 25.75 staff-years.

DOJ/OLC Legal Opinion (Kmiec I et al)

The final point in your letter concerned the Kmiec I memorandum, and others, from the Office of Legal Counsel, Department of Justice (DOJ), which affects regulatory audits and investigations. It was the opinion of the DOJ that the IG of the Department of Labor did not have authority to conduct certain regulatory investigations. The IG, DoD does not conduct regulatory activities of the type addressed in the DOJ opinion. Therefore, the opinion, which is limited in scope, has no affect on the operations of this office.

U.S. Department of Justice

Office of the Inspector General

February 23, 1990

The Honorable John Glenn
Chairman, Committee on Governmental
Affairs
United States Senate
Washington, D. C. 20510-6250

Dear Senator Glenn:

This letter is in response to your written request dated February 2, 1990, for information concerning the need to extend law enforcement authority to Inspector General personnel. Our responses are identified according to the question to which they pertain.

A. The Inspector General Act of 1978, 5 U.S.C. app., as amended by the Inspector General Act Amendments of 1988, Pub. L. No. 100-504, 102 Stat. 2515 ("IG Act") does not grant to personnel of this office the authority to carry weapons. Several statutory provisions, however, vest in the Attorney General the authority to delegate law enforcement powers, including the power to carry a firearm. See 28 U.S.C. §§ 509, 510 (vesting generally in the Attorney General the powers and functions of the Department and its components, and authorizing the assignment of any such function to an officer or agency within the Department); 28 U.S.C. § 566 (authorizing the deputation of Special Deputy United States Marshals); 8 U.S.C. § 1103 (authorizing the Attorney General to assign certain authorities related to the enforcement of immigration laws within the Department).

On January 29, 1990, the Attorney General conferred upon and delegated to the Department of Justice Inspector General certain law enforcement authorities and directed that all individuals designated as special agents within the Office of the Inspector General be deputized as Special Deputy United States Marshals. With this designation came the authority to carry firearms, to make arrests, and to execute certain legal writs, including search warrants. The Attorney General's designation remains in effect until June 30, 1991, to be renewed annually thereafter upon review by the Deputy Attorney General. A copy of this order, Attorney General Order No. 1393-90 (Jan. 29, 1990), is enclosed.

B. All DOJ-IG special agents who presently carry firearms have attended a nine-week course for criminal investigators at the Federal Law Enforcement Training Center that includes firearms training, or have received equivalent formal training. Many have received advanced training. (Each agent is also subjected to a background investigation suitable for a top secret clearance.) Each special agent is encouraged to recertify with his or her firearm every four months; each is required to recertify every six months. Recertification must be made by an approved and trained range instructor. Firearms may be worn when the special agent is on duty performing the duties, functions, and responsibilities assigned to the Inspector General under the IG Act. (Note that the performance of such duties may require work during other than regular business hours.)

C. Not applicable.

D. Not applicable.

E. See discussion above. Generally, we would note that limiting permission to carry a firearm to instances when danger is expected is a very subjective standard that might involve considerable risk to the special agent.

F. The IG Act transferred to the Office of the Inspector General investigators from the United States Marshals Service, the Immigration & Naturalization Service and the Bureau of Prisons who, prior to the transfer, possessed and exercised basic law enforcement authority -- including the authority to carry firearms and make arrests. Upon the establishment of the OIG, the Attorney General issued an order temporarily continuing those law enforcement authorities pending a further analysis of the OIG's caseload, responsibilities, and need for such authorities on a permanent basis. As described above, the Attorney General has now authorized the deputation of all DOJ-IG special agents. The Attorney General's deliberation and decision on this issue demonstrates his continuing support of the Office of the Inspector General. The law enforcement authorities currently in use with the deputation are adequate to carry out the mission of this office. As a consequence, however, this office has no experience pertinent to questions 1 - 7, other than to note that our "blanket" approval occurred during the period addressed by your question 5.

You also asked whether auditors or investigators should be authorized to execute judicially approved search and arrest warrants. While DOJ-IG special agents have and need this authority, see discussion above, this office does not recommend that auditors be so empowered. In our view, the authority to make an arrest or execute a search warrant should not be granted to someone who is not also authorized to carry a firearm or who lacks formal training regarding the lawful exercise of all three powers. It does not appear likely that auditors would have a sufficient need for such powers to justify the additional training that would be required.

You also asked whether this office provides protective services to the head of our agency. We do not provide such services.

Finally, you asked whether memoranda issued by the Office of Legal Counsel (OLC) have had any impact on this office. The OLC opinion referred to in this question as "Kmiec I" has had no impact on the ability of this office to complete its mission. The responsibility conferred by the IG Act upon this office is to investigate allegations of fraud, waste, abuse, and official misconduct. We have done so and are continuing to do so with the full support of the Attorney General.

If this office may be of any further assistance to your Committee in its consideration of this matter, please do not hesitate to contact us.

Sincerely,

Robert L. Ashbaugh
for Anthony C. Moscato
Acting Inspector General

Enclosure

United States Department of the Interior
OFFICE OF INSPECTOR GENERAL
WASHINGTON, D.C. 20240

March 20, 1990

Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

This is in response to your letter to me concerning law enforcement authority for Office of Inspector General (OIG) personnel and the effect of two Department of Justice Office of Legal Counsel memoranda on my Office's activities. I appreciate the opportunity to share with you and the Committee my Office's experiences and my own views relating to these "...vital but controversial issues."

Let me begin by noting that it has been my privilege to serve as Inspector General in two Cabinet Departments -- the Department of Energy from 1981 to 1986 and here at the Department of the Interior since early 1986. As you can see, my personal tenure as an Inspector General is coextensive with much of the relatively short history of the institution in its current iteration under the 1978 Act. For most of my tenure, I was of the view that law enforcement authority for OIG agents was unnecessary and, indeed, ill-advised. About three years ago, however, this opinion changed diametrically. The genesis of that change is rooted in the historical evolution of the Offices of Inspector General in our efforts to effectively accomplish our statutory mission -- detecting, investigating fraud and other related criminal conduct aimed at our agencies' programs and operations, especially in a manner to facilitate criminal prosecution of such conduct and other remedial legal action.

In 1981, when I was appointed Inspector General at the Department of Energy, the investigative components of most Inspector General offices were small, in-house oriented units whose primary focus was administrative investigations. The investigative staff was composed mostly of administrative/background investigators, recently transferred to the newly created IG offices from a variety of departmental or agency inspection and administrative units. At that time, the investigative case inventory of most IG offices, certainly at Energy and here at Interior, consisted largely of noncriminal cases involving employee misconduct, such as misuse of FTS lines, franked envelopes and government-owned-vehicles. This situation was destined for change. As the IG offices grew and became more visible both in our departments and agencies and in the public eye, the nature of the investigative case load changed dramatically. The allegations and other information coming to us from government employees, members of the public, and particularly OIG auditors as a result of their work, shifted from essentially simple misconduct to criminal conduct, frequently of a complex, sophisticated nature and on a large scale. Additionally, there was growing congressional and public concern over the vulnerability of tax dollars and the danger of criminal predation on the programs and operations of our departments and agencies. This shift is dramatically portrayed by my own Office of Investigation's experience in FY 1989. In that one year, our small staff of 41 agents obtained 77 criminal indictments and returned $7,800,336 to the U.S. Treasury in fines, judgments, and restitutions. In the process, they served three search warrants, five arrest warrants, and conducted uncounted confrontational interviews with hostile subjects, witnesses, and the belligerent associates of such subjects and witnesses, in settings that ranged from Indian reservations and rural areas to high crime urban environments. On no less that five occasions, in that year, unarmed agents, men and women, went, alone, to interview the subject of an investigation and found the subject and/or the subject's companion(s) armed. The threats encountered on these occasions have varied from simple display of firearms to threatened use of firearms.

The comparison between this office's case load in 1981 and 1989 is striking and demonstrates a dramatic change in the focus of our investigative resources. As the change in the type of case occurred, so too did the requirements of investigative techniques and tools to effectively carry out investigations of criminal behavior, frequently sophisticated and, increasingly often, by persons with a history of criminal conduct associated with violence. By 1987, as this evolution quickened pace, it became clear to me that our investigative operations were severely hampered by the lack of law enforcement authority, particularly the authority to execute search warrants and the concomitant authority to carry firearms. Of equal importance was the inescapable fact that our agents were being routinely subjected to the risk of assault or worse with no means of protecting themselves and without the legal protections that are essential to all law enforcement officers. Thus, my views on law enforcement authority for OIG agents have changed; I am firmly of the opinion that full law enforcement authority is necessary for OIG agents to investigate effectively and efficiently the criminal activity directed at our department's programs and operations and to provide some minimal protection to those agents in the course of carrying out their duties. As this office's recent and current case load demonstrates, we are, of necessity, heavily involved in criminal investigations with all of the attendant risks. It should be beyond debate that the investigators who are assigned to conduct such criminal investigations should be provided the tools with which to perform those duties.

I have enclosed specific responses to the questions posed in your letter. I would also note that my views on the issues of law enforcement authority for Inspector General investigators, and the jurisdictional problems raised by the Office of Legal Counsel opinion ("Kmiec I"), are more fully set out in an article entitled "The Inspector General Act: Are Its Investigative Provisions Adequate to Meet Current Needs," which is to be published in Volume 12 of the George Mason University Law Review. I expect the volume to be out during the first week of April and will furnish you with a copy of it when it becomes available.

I thank you for the concern for the safety of our agents and your interest in these issues confronting our offices. If you or your staff have any further questions or need additional information, please call me or my deputy Ms. Joyce Fleischman at 343-5745.

Sincerely,

James R. Richards

James R. Richards
Inspector General

Enclosures

RESPONSES TO SPECIFIC QUESTIONS

A. Although the Department of the Interior has four statutory grants of law enforcement authority, no law enforcement authority under any of these grants has been delegated to the Inspector General (Enclosure 1). However, as noted in item F below, all of our agents are deputized as Special Deputy U.S. Marshals; therefore, we have developed a comprehensive firearms and physical training program as well as procedures governing the care and use of firearms (see items B and E below).

B. Although the question seeks information only with respect to "firearms training," we are providing, additionally, information with respect to the two other components of law enforcement authority, i.e., the authority to execute search warrants and to make arrests. The authority to execute search warrants is of particular importance to us in conducting criminal investigations. Over the years, our investigative cases have involved an increasing number of highly sophisticated, complex frauds and other financial (as well as other forms of) crimes. Much, if not most, of the evidence of such crimes is easily destroyed and is in the hands or control of the perpetrator(s). Increasingly, in such cases, the investigative tool of choice of the U.S. Attorney directing the investigation is the judicially approved search warrant. Theoretically, the search warrant could be executed by the FBI, the U.S. Marshals Service or some other duly authorized Federal law enforcement body. However, there are two major problems with this approach. One is a matter of economy and efficiency, of practicality, if you will. Other law enforcement agencies have their own priorities, which obviously take precedence over, what amounts to, "doing a favor" for our office. Consequently, critical investigations by our agents are delayed until another agency has time to do what is really our agency's work, if we can persuade them to do it at all. The other aspect of the problem is, in some ways, even more detrimental to the conduct of the investigation. Agents from other organizations who do ultimately execute the search warrant are not familiar with the case itself and, therefore, don't have the intimate knowledge of the matter necessary to ensure that they recognize pertinent evidence. This is particularly worrisome in cases of sophisticated, complex fraud and other financial crimes.

The authority to make arrests is also a useful tool, particularly in certain situations wherein a U.S. Attorney needs the potential evidence that a fleeing, convicted subject of one of our investigations could give were he in custody. In these situations, it is virtually impossible to obtain the services of another Federal law enforcement entity, already overburdened with its own work, to make the arrest in a timely manner, if at all. Consequently, additional, "follow-on" related investigations and possible prosecutions of criminal activity involving this Department's programs are impeded or worse.

Thus, these are the two tools of law enforcement authority most necessary to carrying out our mission to successfully investigate criminal activity directed at the Department's programs and operations. Firearms authority is a concomitant component of these aspects of law enforcement authority; it is an adjunct authority provided to the agent to enable him or her, when necessary, to successfully exercise the other authorities. Accordingly, our agents need full law enforcement authority -- all of the three components -- to successfully carry out the mission of this office.

As noted below (Item F), we have requested and obtained deputization as Special Deputy U.S. Marshals for all of our agents for certain classes of cases because of the needs described above. We have instituted a comprehensive training program and issued detailed procedures governing the use of the law enforcement authority thereby provided. (Copies of pertinent Inspector General Manual Chapters are enclosed.) All of our agents have received training in the law of search and seizure, arrest and the mechanics of arrest. All new agents coming into our office undergo Criminal Investigator Training at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, in the same classes, using the same syllabus, as agents from the U.S. Secret Service and ATF. Older agents from other law enforcement organizations received such training with their former organizations. Additionally, we provide annual refresher training in these areas.

With respect to firearms training, in the past year, all of our agents have undergone an additional three-day firearms training program provided by the U.S. Park Police Special Operations Division. This training was specifically directed at our issue weapon, the Smith and Wesson 9 mm Model 6906. Each of our regional offices has a federally certified firearms instructor who is a graduate of the two-week FLETC Firearms Instructor School and the one-week Smith and Wesson Armorer School. These instructors are responsible for ensuring that each agent qualifies to FLETC standards no less than once a quarter and that all weapons in the regions are subjected to rigorous periodic inspection. In addition, each regional office has a physical training instructor who is a graduate of the FLETC Physical Training Coordinator Program. These instructors are part of a comprehensive physical training program that provides for biennial physical examinations for agents under 40 and annual physicals for agents over the age of 40. All agents are given up to three hours a week in physical training time and are given an annual physical fitness evaluation that includes a 1.5 mile run to measure endurance, bench press to measure upper body strength, and flexibility and coordination tests. The evaluation is curved for age and sex and establishes minimum physical fitness levels which are a condition of employment. At present, a third of our agents have graduated from the FLETC advanced program on physical confrontation and escalation of force, and the remainder will undergo this training within the calendar year.

C. As noted above (Item B), the impact of the lack of firearms on our ability to accomplish our investigative mission is, in essence, secondary to the impact of the lack of the other two components of law enforcement authority, particularly, the authority to execute search warrants. As described above, the lack of full law enforcement authority has a very definite negative effect on our ability to effectively and efficiently investigate cases involving complex criminal schemes directed at the Department's programs.

As you indicate, however, by this question, there is another aspect of the overall problem -- that is, that our agents continue to perform inherently dangerous work without the minimal protection that a firearm provides. It is unconscionable to continue to send unarmed men and women (frequently alone due to shortage of staff to handle an ever-increasing case load) to conduct criminal investigations in a society in which firearms are ubiquitous and whose murder rate exceeds that of all other major industrialized nations combined. Increasingly, we find that the subjects of our investigations and/or their associates are involved in other criminal activity as well as that which we are investigating. Much of this other criminal activity is of the variety more typically associated with violence, such as narcotics and armed robbery. Indeed, a subject of one of our cases involving a simple matter of dual compensation was a suspect in a serial murder case. (We learned of this after we had conducted the interview with this person.) Ultimately, he pled guilty to one of the murders in exchange for information concerning other suspects. In another case, one of our agents, unarmed, sought to interview a witness. The response to his knocking on the door was a hand gun shoved in his face by the witness's companion. It turned out that the witness had been involved in an attempted murder related to narcotics trafficking the night before, and the companion was attempting to protect him from retaliation by the intended murder victim's associates. As I noted earlier, in FY 1989 alone, on five occasions, unarmed agents from this office went to remote locations to interview the subject of an investigation and found the subject and/or the subject's companions armed. The threats encountered on these occasions ranged from simple display of firearms to threatened use of firearms. Situations of this nature are increasing in frequency, and I believe we have no choice but to provide the men and women who are performing these increasingly dangerous duties with the minimal protection that firearms authority affords.

D. Upon receipt of deputations as Special Deputy U.S. Marshals for all 41 of our agents (noted in Item F), we established a comprehensive program of training, including quarterly firearms qualification, physical training and testing, and routine refresher training in search and seizure and arrest law and mechanics (noted in Item B). We also purchased weapons, ammunition, and other necessary assorted equipment. The initial "start-up" cost was $34,186. We anticipate an annual cost of approximately $65,000 to $72,000, assuming that deputations continue. We would not anticipate any additional costs should law enforcement authority be granted directly to OIG agents.

E. When this office applied for deputations as Special Deputy U.S. Marshals, we drafted policy and procedures for the handling and use of firearms; upon receipt of the deputations, we finalized the policy and procedures in our Inspector General Manual (copy enclosed). Of course, the carrying and use of firearms by our personnel is also governed by applicable Federal laws and regulations, e.g., Federal Aviation Administration Regulations regarding transporting and carrying firearms aboard commercial aircraft. As the OIG Manual states, "only those agents who are designated by the Assistant Inspector General for Investigations and sworn as Special Deputy U.S. Marshals are authorized to carry firearms while on official duty as stated in the special deputation authorization." The agents are instructed to avoid the use of force whenever assigned duties can be discharged in a peaceful manner and may use the weapons only as a last resort to prevent loss of life or serious bodily injury when there is imminent danger of such an occurrence.

We note that in the process of developing the standards and training programs mandated by our deputations, we consulted training officers for the FBI, the DEA, the Secret Service and ATF. Each of these organizations makes the explicit assumption that the conduct of criminal investigations is an inherently dangerous pursuit and therefore agents should be armed during the performance of their duties. Each organization bases much of its training on the assumption that the greatest danger often comes from the unexpected corner. They preach that agents are generally alert during searches and arrests but note that the last Secret Service agent killed in the line of duty was simply sitting in a car on surveillance. Our own experiences, as we noted earlier in the examples in Item C bear this out. We agree that criminal investigations are inherently dangerous, and investigators should be armed in the performance of their duties.

F. Forty-one agents of this office carry U.S. Marshals' deputations for Bureau of Indian Affairs cases subject to the concurrence of the U.S. Attorney's office in which an individual case will be investigated. Law enforcement authority under these deputations was authorized on June 19, 1989, by Joe D. Whitley, Acting Associate Attorney General, for a one-year trial period through June 30, 1990 (copy enclosed). In addition to these deputations, our two agents on Guam and one on Saipan are deputized to work cases under the direction of the U.S. Attorney's office on Guam. Those three deputations were authorized on January 29, 1988, to expire on June 30, 1988, by John C. Keeney, Deputy Assistant Attorney General, Criminal Division (copy enclosed). The three deputations have been renewed for one-year periods, the latest to expire on June 30, 1990. At present, we have requested deputations for eight of our agents to be used in investigations involving the Department of the Interior's Office of Surface Mining. To date, none of our requests has been denied.

The process for obtaining deputations as Special Deputy U.S. Marshals is somewhat cumbersome and can be quite lengthy. In our experience, the turnaround time has varied from eight weeks to six months. This time frame is particularly burdensome since the deputation is to be requested, granted, and used for a specific investigation. Indeed, the timing problem generated this office's request, supported by a number of U.S.

Attorneys' offices with whom we worked on BIA matters, for "blanket" deputation for those cases. In general, the deputation process begins with a letter of request from the Inspector General, supported by a letter(s) from the U.S. Attorney(s) in whose jurisdiction the case(s) are to be worked to the Assistant Attorney General (or the Deputy Assistant Attorney General) for the Criminal Division. No official in the Department of the Interior has approval authority for either the request for or the granting of such deputations. So far, based on the letters of approval that we have received from the Department of Justice, the approving official there appears to be either the Assistant Attorney General for the Criminal Division or an Associate Attorney General. We are not aware of any avenue for reconsideration of denial of a request for deputation. As I stated earlier, to date, none of our requests has been denied. Consequently, we cannot speak to what reasons the Department of Justice might have for denying a request for deputation. The only guidance that we have for renewal of a deputation appears in the two letters from Department of Justice officials (referenced above) authorizing deputations for our agents. In Letter from William F. Weld, Assistant Attorney General (signed by John C. Keeney, Deputy Assistant Attorney General) to James R. Richards (January 29, 1988), we were told that "...all special deputations expire automatically on June 30, 1988, " [and] "[s]hould [we] wish an extension of the special deputation, [we] may submit a letter requesting renewal prior to the expiration date." And, in Letter from Joe D. Whitley, Acting Associate Attorney General, to James R. Richards, Inspector General (June 19, 1989), we were told, with respect to the limitations and conditions of the deputation, that, "The sanction for non-compliance with such specific conditions and limitations is limited to non-continuation of or non-renewal of deputation during or after the trial period with respect to any or all investigators assigned to the Office of Inspector General, Department of the Interior." With respect to the deputations for our three agents on Guam and Saipan, we have requested renewals by letter on a year-to-year basis, and we plan to request extensions of the deputations for BIA cases.

As we understand it, Department of Justice guidelines for approval of special deputation requests require that the anticipated investigative procedures for which deputation is required are: (1) hazardous to the life or physical safety of a criminal investigator or a cooperating witness;

(2) necessary for the successful completion of the federal investigation; and (3) not capable of performance by another law enforcement agency with firearms and arrest powers. These are the criteria that a U.S. Attorney must address in support of our request for deputation, and, of course, each of our requests, whether for individual cases or so-called "blanket" authorization for a class of cases, addresses these same criteria.

We believe that these are the criteria that should be addressed for any grant of law enforcement authority to any investigative agency. And, we firmly believe that the overall criminal investigative case load and the experience of our agents working these cases demonstrate that law enforcement authority is necessary for this office to successfully and safely accomplish its investigative mission. The clearest evidence of this need is the fact that within six months of the deputation of our agents for BIA cases, this office served three search warrants, five arrest warrants and obtained 37 criminal indictments as a direct result of the evidence obtained. In each of the matters involved, we had sought the assistance of other law enforcement agencies, either to work the case jointly or to serve the warrants. In each case, those agencies were unable to assist us. Had we not gotten the deputations, those results could not have been obtained. Luckily, the time that elapsed while we unsuccessfully sought assistance did not preclude the ultimate success of the investigations. However, there are occasions when cases simply don't get investigated as they should because we can't get the FBI or some other law enforcement agency either to take the case or join with us to do the investigation, and we don't have the tools of law enforcement authority to effectively and safely conduct the investigations ourselves.

So, in answer to your question as to whether the authority to execute judicially approved search and arrest warrants be given to Inspector General personnel, my answer is yes.

The lack of clear authority to request and execute search warrants has created problems for Inspectors General in our conduct of criminal investigations. Multi-million dollar procurement fraud and embezzlement cases are based heavily upon documentary evidence. An Inspector General's administrative subpoena power is often ineffective in such investigations because the warning it gives the subject allows him to secret or destroy documents, and prepare explanations and defenses. Further, since the subpoena must be enforced in a Federal court, a wealthy individual or corporation, with ready access to resourceful counsel, can easily frustrate the investigation through time-consuming legal proceedings.

The problems associated with obtaining assistance from law enforcement agencies have already been highlighted. However, special difficulties present themselves when search warrants are involved. Law enforcement officers from other agencies who are called upon to assist Inspectors General by obtaining and serving search warrants often lack knowledge about the particular case, the programs of the agency, and the types of evidence to be seized. There is the distinct possibility that they will fail to recognize pertinent information due to their lack of familiarty with the matter. They are called upon to swear to affidavits in support of the search warrant in cases where they are not intimately aware of the facts, and do so with knowledge that has been obtained through briefings by other criminal investigators. Additionally, the practice of requesting assistance from other law enforcement agencies is highly inefficient, in that it results in two agents performing an assignment which could have been performed by one, and diverts scarce law enforcement resources from the performance of other equally important missions such as drug investigations.

No protective services have been provided by this office to the head of the agency in the last five years. Indeed, there is no record of such services in the entire history of the Office of Inspector General in Interior.

As a result of the so-called "Kmiec I" opinion, investigations which were generally and routinely conducted by Inspectors General of the following types of matters now appear to fall outside of their authority.

1. Impersonating an agency official; misusing an agency seal or logo, in a way which defrauds a third party who is not the recipient of Federal funds.

   EXAMPLES: An individual could claim to be an agency employee and induce third parties to pay him a fee to speak before a gathering; or an individual could use a forged agency seal on letterhead to collect a debt from a third party (implying their actions were taken under the authority of the Federal government); or and individual could publicly sell items marked with an agency logo, implying that the items were officially issued by or connected with the agency, or that the proceeds went to the Federal government.

2. Fraud in the procurement of a nonmonetary Federal benefit.

   EXAMPLES: An individual could make false statements on an application to obtain a Federal license or certificate. In many instances, the regulatory bureau responsible for granting the benefit would have too few of these cases to warrant the employment of a full time GS-1811 investigator experienced in fraud investigations, so they would refer them to the OIG, the only bureau in their agency with the appropriate expertise. Often these regulatory bureaus do not view the conduct of "criminal" investigations as part of their responsibility; their job is to regulate the industry or administer the benefits, not investigate crimes.

3. Fraud in the nonpayment of funds to the Federal government.

   EXAMPLES: An individual or company could defraud an agency so as to avoid paying amounts owed on timber contracts or mineral leases. Since the money would be flowing into the agency instead of from the agency, this type of fraud appears to be outside the rationale of the OLC opinion.

All of the above cases involve the commission of "fraud," and all are "related to the programs and operations" of their agency, in that there is some connection between the fraud and the agency. Accordingly, the agencies are expected by Congress and the public to "do something about the problem." The cases are usually either too trivial or too specialized to be of investigative interest to the FBI, and are considered "Federal matters" by state and local law enforcement agencies; so an FBI declination of investigation means that these cases, which are significant to their respective agencies and currently investigated by Inspectors General, have to go uninvestigated.

We have not experienced any problems as a result of the "Kmiec II" opinion, but the uncertainty of its interpretations and implications are most troublesome.

United States
Department of
Agriculture

Office of
Inspector
General

Washington,
D.C.
20250

21 FEB 1990

The Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This is in response to your February 2, 1990 letter requesting information regarding various issues concerning my agency's law enforcement and investigative authorities. I will respond to your questions under the headings shown in your letter.

1. A. Office of Inspector General (OIG) criminal investigators, pursuant to section 1337 of Public Law 97-98, the Agriculture and Food Act of 1981, 7 U.S.C. 2270, currently exercise the authority to carry firearms. Section 1337 also grants authority for our criminal investigators to make arrests without a warrant in certain circumstances and to execute arrest and search warrants while conducting investigations of felony violations of statutes administered by the Secretary of Agriculture or any agency of the Department of Agriculture. A copy of section 1337 of Pub.L. 97-98 and the implementing regulations in 7 C.F.R., Part 1a are enclosed.

B. Prior to being authorized to carry a firearm, an OIG criminal investigator must successfully complete the Criminal Investigator School at the Federal Law Enforcement Training Center, or successfully complete a comparable training program from another law enforcement agency; pass a medical examination and be physically capable of exercising law enforcement authority; and, pass a Practical Pistol Qualification Course, receiving a rating of qualified or higher. Once initially qualified, a criminal investigator must demonstrate continued proficiency in firearms by successfully passing the Practical Pistol Course every three months.

OIG Criminal Investigators may carry a firearm while on duty. Criminal investigators do not carry firearms off duty except when traveling to and from their office or work site, or under special circumstances when it is deemed by a supervisor to be prudent to do so (e.g., when a threat of bodily harm has been made toward an investigator or his/her family).

We believe the authority to carry a firearm, as well as the other law enforcement authorities our investigators exercise, have been significant factors in OIG's success in combatting fraud and other criminal activities in agriculture programs.

C-E. Not Applicable

F. During the 1970's, our investigators were regularly deputized by the Marshals Service as special deputy United States Marshals. However, in 1979 the Marshals Service stopped deputizing our investigators, as well as investigators from other investigative agencies. When the Secretary of Agriculture requested clarification of this decision, the then Deputy Attorney General advised him that the applicable statutes and regulations limited such deputations to circumstances where the special deputy was performing the duties of a deputy marshal and "the needs of the U.S. Marshals Service" required the deputation.

We understand that the Department of Justice has changed its policy in this area and it again is possible, in certain circumstances, to obtain special deputations. However, since our criminal investigators obtained law enforcement authorities of a more permanent nature in 1981, we have not found it necessary for our investigators to seek special deputations from the Marshals Service.

2. As stated previously, section 1337 of Pub.L. 97-98 granted OIG criminal investigators the authority to serve arrest and search warrants for felony violations of statutes administered by the Department of Agriculture. Since we began exercising those authorities in 1982, our criminal investigators have made more than 2,100 felony arrests and executed more than 250 search warrants. We believe that the authority to execute arrest and search warrants is as valuable to our investigative program as the authority to carry a firearm.

We support general law enforcement authority for Inspector General criminal investigators to carry firearms and execute search and arrest warrants. While our current authority to execute search and arrest warrants when conducting investigations under statutes administered by the Department of Agriculture has increased our agency's effectiveness, we believe that authority to execute search and arrest warrants for violations of all statutes relating to the programs, personnel or operations of the Department of Agriculture would enable our investigators to act even more efficiently in carrying out OIG's investigative and enforcement responsibilities.

General search and arrest authorities would also eliminate an ambiguity that is present in our current law enforcement authorities. Our law enforcement authorities authorize arrests and the execution of arrest and search warrants for felony violations of statutes that are administered by the Department of Agriculture. Technically, though, the Department administers programs, not statutes. Many criminal violations of Department of Agriculture programs are prosecuted under title 18, United States Code, which the Secretary of Agriculture cannot be said to administer. For example, general search and arrest authorities would correct the following anomaly:

An OIG criminal investigator may make a felony arrest and execute a search warrant for a felony violation of the Food Stamp Act, 7 U.S.C. 2024. However, section 1337 of Pub.L. 97-98, might be interpreted as not authorizing the criminal investigator to exercise these authorities if he/she is investigating similar conduct, constituting a conspiracy, under 18 U.S.C. 371, to violate the Food Stamp Act.

3. Since 1970, the Inspector General of the Department of Agriculture has been responsible for providing personal protection for the Secretary of Agriculture. The authority for this activity is found in 7 C.F.R. 2.33(b). OIG commits about two to three staff years for protective services.

4. The March 9, 1989 opinion of the Office of Legal Counsel (OLC) regarding the authority of the Labor Department Inspector General to conduct certain "regulatory" investigations has had no effect on the conduct of investigations by my office.

   When the Inspector General Act of 1978 was enacted, the functions of the Agriculture Department's Office of Investigations (OI) were transferred to the statutory OIG. Those functions included the authority to initiate, conduct and control all investigations for the Department of Agriculture. OI also had the authority to make determinations as to the proper areas of investigative jurisdiction of the USDA agencies which conducted investigations as part of their compliance programs. That broad authority had been delegated by the Secretary to OI since 1974 and to its predecessor agency, the nonstatutory OIG, since 1962. Therefore, we believe OIG currently has the authority to conduct any investigation relating to Agriculture Department programs, operations or personnel. We believe our position is consistent with both the Inspector General Act and the OLC opinion. To date, the Department of Justice has not questioned the investigative authorities of my office. Of course, these comments should not be read as signifying either our concurrence or agreement with the reasoning or conclusions of the OLC memorandum.

I am pleased to have been given the opportunity to reply to your questions. Should your staff have any additional questions concerning the matter, please have them contact Craig L. Beauchamp, Assistant Inspector General for Investigations at 447-3306.

Sincerely,

Leon Snead
LEON SNEAD
Deputy Inspector General

Enclosure

§ 2270. Authority of Office of Inspector General

Any person who is employed in the Office of the Inspector General, Department of Agriculture, who conducts investigations of alleged or suspected felony criminal violations of statutes, including but not limited to the Food Stamp Act of 1977 [7 U.S.C.A. § 2011 et seq.], administered by the Secretary of Agriculture or any agency of the Department of Agriculture and who is designated by the Inspector General of the Department of Agriculture may—

(1) make an arrest without a warrant for any such criminal felony violation if such violation is committed, or if such employee has probable cause to believe that such violation is being committed, in the presence of such employee;

(2) execute a warrant for an arrest, for the search of premises, or the seizure of evidence if such warrant is issued under authority of the United States upon probable cause to believe that such violation has been committed; and

(3) carry a firearm;

in accordance with rules issued by the Secretary of Agriculture, while such employee is engaged in the performance of official duties under the authority provided in section 6, or described in section 9, of the Inspector General Act of 1978 (5 U.S.C.App. 6, 9). The Attorney General of the United States may disapprove any designation made by the Inspector General under this section.

(Pub.L. 97-98, Title XIII, § 1337, Dec. 22, 1981, 95 Stat. 1294.)

References in Text. The Food Stamp Act of 1977, referred to in text, is Pub.L. 88-525, Aug. 31, 1964, 78 Stat. 703, as amended, which is classified generally to chapter 51 (§ 2011 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under 2011 of this title and Tables volume.

Sections 6 and 9 of the Inspector General Act of 1978, referred to in text, are sections 6 and 9 of Pub.L. 95-452, Oct. 12, 1978, 92 Stat. 1101, as amended, which is set out in the Appendix to Title 5, Government Organization and Employees.

Effective Date. Section effective on such date as the Secretary of Agriculture may prescribe, taking into account the need for orderly implementation, see section 1338 of Pub.L. 97-98, set out as a note under section 2012 of this title.

Legislative History. For legislative history and purpose of Pub.L. 97-98, see 1981 U.S. Code Cong. and Adm. News, p. 1965.

Library References

Agriculture 🔑2.

C.J.S. Agriculture §§ 8 et seq., 51, 67, 96, 100, 134, 175.

Code of Federal Regulations
7 CFR Part 1a

PART 1a—LAW ENFORCEMENT AUTHORITIES

Sec.

1a.1 General statement.
1a.2 Authorization.
1a.3 Persons authorized.
1a.4 Limitations.
1a.5 Responsibility of the Inspector General.

AUTHORITY: Sec. 1337, Pub. L. 97-98; 5 U.S.C. 301; 5 U.S.C. App. I.

SOURCE: 47 FR 2073, Jan. 14, 1982, unless otherwise noted.

§ 1a.1 General statement.

This part sets forth the rules issued by the Secretary of Agriculture to implement section 1337 of Pub. L. 97-98 relating to:

(a) Arrests without warrant for certain criminal felony violations;

(b) Execution of warrants for arrests, searches of premises and seizures of evidence; and

(c) The carrying of firearms by designated officials of the Office of Inspector General.

§ 1a.2 Authorization.

Any official of the Office of Inspector General who is designated by the Inspector General according to §§ 1a.3 and 1a.5 of this part and who is engaged in the performance of his/her official duties under the authority provided in section 6, or described in section 9, of the Inspector General Act of 1978 (5 U.S.C. App.), is authorized to—

(a) Make an arrest without a warrant for any criminal felony violation subject to § 1a.4, if such violation is committed, or if the official has probable cause to believe that such violation is being committed, in his/her presence;

(b) Execute and serve a warrant for an arrest, for the search of premises, or the seizure of evidence if such warrant is issued under authority of the United States upon probable cause to believe that any criminal felony violation, subject to § 1a.4, has been committed; and

(c) Carry a firearm.

[50 FR 13759, Apr. 8, 1985]

§ 1a.3 Persons authorized.

Any person who is employed in the Office of Inspector General and who is designated by the Inspector General in accordance with and subject to § 1a.5 and who conducts investigations of alleged or suspected felony criminal violations of statutes administered by the Secretary of Agriculture or any agency of the Department of Agriculture may exercise the authorities listed in and pursuant to § 1a.2.

§ 1a.4 Limitations.

The powers granted by §§ 1a.2(a) and 1a.2(b) shall be exercised only when a designated official is engaged in an investigation of alleged or suspected felony violations of statutes administered by the Secretary of Agriculture or any agency of the Department.

[50 FR 13759, Apr. 8, 1985]

§ 1a.5 Responsibility of the Inspector General

The Inspector General shall:

(a) Issue directives conforming to this part governing the exercise of the authorities granted by this part. These directives should contain the policies and procedures by which the authorities will be exercised by designated officials of the Office of Inspector General;

(b) Establish criteria for qualification by officials of the Office of Inspector General who are designated to exercise the authorities granted in this part;

(c) Monitor the implementation and exercise of the authorities granted by this part;

(d) Designate, pursuant to §§ 1a.2, 1a.3 and 1a.4, and the directives issued under paragraph (a) of this section, and the criteria established under paragraph (b) of this section, employees who have satisfied all the qualifications set by the Inspector General to exercise the authorities granted by § 1a.2; and

(e) Submit to the Attorney General of the United States the name of any employee of the Office of Inspector General designated pursuant to paragraph (d) of this section. Any designation not specifically disapproved by the Attorney General within 30 days after the date of submission shall be deemed approved.

Department of Energy
Washington, DC 20585

March 1, 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am replying to your letter of February 2, 1990, concerning the granting of general law enforcement authority to Offices of Inspectors General. My answers follow the order of your questions.

A. Does your agency's governing statute permit I.G. personnel to carry weapons. If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.

(A) I believe that neither the Atomic Energy Act of 1956, as amended, nor the Department of Energy's Organizational Act of 1977, permits my investigative agents to carry weapons for the purposes of performing the duties assigned under the Inspector General Act of 1978 as amended.

B. If your answer to question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?

(B) N/A

C. If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where inspector general personnel may have been unnecessarily placed in danger as a result.

(C) The lack of firearms authority has not caused serious problems in the performance of the mission of this office, but the lack of firearms authority has impaired the timeliness and completeness of some investigations when our agents have perceived themselves in personal danger.

D. What additional training and expenses would be included if firearms authority was provided inspector general personnel?

(D) We believe that should firearms authority be provided to Inspector General personnel, initial training could be provided at the Federal Law Enforcement Training Center (FLETC), Glynco, GA; we believe additional expenses would include travel and per diem for our agents while they undertook such training and loss of productivity while in such training, as well as ancillary costs for weapons, ammunition, storage containers and the preparation of appropriate controlling documentation and internal policy directives; we also anticipate that out year costs would be incurred for regularly scheduled, at least annually, continued training for all our agents and their supervisors.

E. What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)

(E) Limitations on such powers would include, at least, the wearing of firearms only in those instances when danger is expected; we would expect investigative agents to discuss with, and if warranted, be authorized the carrying of firearms by immediate supervisors.

F. It has been suggested that deputation as Assistant U.S. Marshal's may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation. You may wish to consider the following issues:

(F)

1. What is the procedure for obtaining authorization for appointment as a Special Deputy U.S. Marshal for your personnel? Which officials within your agency or at the Department of Justice must approve such deputations?

2. On average, how long does the process of reviewing requests for these appointments take?

(1-2) All requests for deputation must be forwarded to the Criminal Division, U.S. Department of Justice, to the attention of the Deputy Assistant Attorney General who has authority to approve the request.

3. How many requests for deputation have you sent to the Department of Justice during the last year? How many have been denied? For what reasons?

4. Is there any avenue for reconsideration of denial of a request for deputation?

5. I have been informed that "blanket authorization was granted to criminal investigators of the Department of Interior for purposes of investigating Bureau of Indian Affairs matters. Under what circumstances are such "blanket" approvals granted? How many have been requested and how many have been granted since January 1, 1990?

6. Are requests that agents be deputized ever denied by the Department of Justice even though they have been requested by the pertinent United States Attorney's Office? For what reason would the Department of Justice override the recommendation of a United States Attorney's Office?

7. How long does a Marshal's appointment last? What is the procedure for renewal of deputation? How long does this process take?

   (3-7) This office has not made any requests for deputation since the institution of the above procedures. Prior thereto only one request was made orally to the U.S. Attorney's Office, Western District, Washington, and that request was denied because the Federal Bureau of Investigation could be utilized to perform the task needed.

   The Department of Justice's procedures do provide that if investigative circumstances change after an initial denial to deputize, DOJ will consider a renewed request. This office has not requested in writing any deputation; therefore, answers cannot be provided to your remaining questions.

Second, I am concerned about reports that audit and investigations are also impeded by the perceived or actual lack of authority to execute judicially approved search and arrest warrants. Should this power be given to inspector general personnel?

> Second: With respect to the absence of authority to execute judicially approved search and arrest warrants, we believe that such absence has at times impeded investigations conducted by my office in that we have had to defer to other law enforcement agencies for the execution of judicially approved search and arrest warrants, clearly an impairment of both the statutory independence and the performance of statutory duties required of an Office of Inspector General. We support, therefore, legislation that would permit Inspectors General the discretion to utilize full law enforcement authority when necessary.

Third, I would appreciate receiving a complete description of protective services, if any, furnished by I.G. personnel for the head of your agency during the past 5 years, including some estimate of the personnel years expended on this purpose, and the authority for providing such services.

> Third: With respect to your question concerning protective services, this office has not provided any of its personnel for protective services for the head of this Agency during the past 5 years.

Fourth, the Committee has heard testimony from a number of inspectors general concerning the limitations the Justice Department has sought to impose on I.G. audit and investigative activities in two memorandums issued by the Office of Legal Counsel (particularly "Kmiec I" dated March 9, 1989). Please provide the Committee with any comments you may have on the impact of these memorandums on your ability to complete your mission.

> Fourth: To this date our efforts have not been impeded by the subject two memoranda issued by the Office of Legal Counsel.

Please let me know if I may be of any additional assistance.

Sincerely,

John C. Layton

John C. Layton
Inspector General

U.S. Department of Labor

Inspector General
Washington, D.C. 20210

MAR 12 1990

The Honorable John Glenn
Chairman
Committee on Government Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Senator Glenn:

Thank you for your letter of February 2, 1990, inquiring about the issue of law enforcement powers for Inspector General (I.G.) personnel. I am delighted to have the opportunity to respond to this very critical issue facing the Offices of Inspector General. As the following answers to your questions demonstrate, I believe statutory law enforcement powers are essential to our agents if they are to carry out their mission effectively and efficiently.

A. Does your agency's governing statute permit I.G. personnel to carry weapons. If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.

No. The Department of Labor has no governing statute permitting I.G. employees to carry weapons.

B. If your answer to question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?

Although the answer to question A was negative, as you may be aware, in addition to its Office of Investigations (OI) which investigates traditional IG cases, the Office of Inspector General at the Department of Labor also has an additional component. That office, called the Office of Labor Racketeering (OLR) employs criminal investigators who are presently deputized as Special Deputy United States Marshals pursuant to a blanket deputation from the United States Department of Justice (DOJ). Most investigators have received basic training from the Federal Law Enforcement Training Center in firearms, arrest procedures, search and seizure law and constitutional law. The remaining investigators received their basic federal firearms training from their previous employer, such as the FBI and Postal Inspection Service. OLR investigators are required to requalify with their weapon on a semi-annual basis. Investigators may carry a firearm while engaged in the performance of their duties. An investigator may carry a weapon in off-duty status only when the investigator or his/her family is under an identifiable threat of physical harm arising out of performance of official duties.

The mission of OLR is to identify and reduce organized crime and labor racketeering in the labor-management field. OLR investigations focus on criminal violations in the areas of labor-management relations, employee benefit plans and internal union affairs. Investigative activities include protection of cooperating witnesses, surveillances of suspects, including organized crime figures, execution of search warrants, service of grand jury subpoenas to hostile witnesses, undercover operations and dangerous interviews. It is essential that OLR investigators carry weapons in order to carry out OLR's mission.

OI investigators do not operate under a blanket deputation but are authorized to carry firearms in two instances: one, to provide protective services for the Secretary of Labor; and two, to conduct case specific investigations (see response to F). Each instance requires prior approval by DOJ as well as an elaborate justification procedure in order for agents to be deputized as special Deputy U.S. Marshals. OI investigators must qualify with a firearm prior to being authorized to carry the weapon. In addition, they must requalify on a periodic basis while in Special Deputy U.S. Marshal status.

It is also essential that OI investigators carry firearms. Carrying firearms, however, is only one of the tools needed by investigators to effectively perform their mission. The authority to execute search warrants and to make arrests is essential as well. Such authorities reduce some of the inherent risks faced by criminal investigators at all levels of government. They are also necessary to protect witnesses and the agents themselves.

C. If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where Inspector General personnel may have been unnecessarily placed in danger as a result.

The lack of statutory authority to carry firearms continues to place investigators in unnecessarily dangerous situations and often impedes investigative endeavors. Our investigators are frequently placed in extremely dangerous situations. I have attached a number of illustrative examples that highlight the problems arising from the lack of law enforcement authority. (See attachment 1)

D. What additional training and expenses would be included if firearms authority was provided by inspector general personnel?

OLR would not incur any additional expenses and would not require additional training of its investigators.

Very little additional training or expense would be entailed for OI. OI has an established written firearms policy. Many OI investigators routinely qualify with firearms to maintain proficiency for instances involving special deputations. The total cost to fully equip and train the remainder of OI investigators would not exceed $20,000.

E. What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)

OLR presently requires its investigators to carry firearms at all times while on official duty since danger cannot be always anticipated. The only exception is in the office where the firearm is stored in a locked safe. OI would probably require its investigators to follow the same rules and to carry firearms while on official duty status.

F. It has been suggested that deputation as Assistant U.S. Marshal's may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation.

OLR investigators received a blanket deputation from DOJ on July 9, 1987, renewable on a yearly basis. While this delegated law enforcement authority has dramatically raised the credibility of OLR and increased the effectiveness and efficiency of its investigative operations, it is a poor substitute for statutory law enforcement authority. The renewal process has proven to be cumbersome, inefficient, expensive, and inordinately burdensome even when done on a group basis. OLR is required to report detailed statistics to DOJ on a quarterly basis. Moreover, the renewal process as described below has proven to be disruptive to OLR operations. The uncertainty of continued authority may also cause recruitment and retention of personnel problems.

DOJ's renewal of the blanket deputations has not been timely and has created voids in the blanket deputation. On June 30, 1988, the initial deputation expired. The local U.S. Marshals were not notified by June 30, 1988, and, as a result, a number of OLR investigators were not redeputized on time. Several investigations had to be suspended since the investigative activity included dangerous interviews, surveillances and protection of cooperating witnesses. One agent who was under a threat at the time was unable to protect himself until he was redeputized. OLR encountered similar problems when the blanket deputation was renewed in June 1989. The Associate Attorney General did not approve renewal of the blanket deputation until

June 29, 1989. Consequently, most OLR investigators were not redeputized until after July 4, 1989. Again, several OLR investigations had to be suspended for safety reasons.

The issue of law enforcement authority has been a source of contention between OLR and DOJ for over seven years. On February 2 and 3, 1983, the Senate Committee on Labor and Human Resources held hearings on the need for statutory law enforcement for OLR investigators.

On April 27, 1983, the Senate Permanent Subcommittee on Investigations (PSI) in hearings concerning the Hotel Employees and Restaurant Employees International Union recognized the need for OLR law enforcement powers.

On November 14, 1983, legislation was introduced, (S. 2090) to grant law enforcement authority for criminal investigators of the Office of Labor Racketeering. The bill was cosponsored by Senators Hatch, Nunn, Nickles, Rudman, Grassley, and Chiles. It was referred to the Committee on Governmental Affairs.

The need for law enforcement authority for OLR was reiterated in hearings held by the PSI on June 25, 1984, in the PSI profile of organized crime in the mid-atlantic region. In fact, PSI urged hearings be held by the Senate Governmental Affairs committee on the issue.

On July 31, 1984, then Secretary Ray Donovan in a letter to the Director, Office of Management and Budget, supported S. 2090 stating, "Administration support of S. 2090 will serve as a strong statement of our commitment to combatting labor racketeering in protecting the rights and benefits of American workers."

The Department of Justice refused to support this legislation. Their objections centered on what they considered to be a general proliferation of law enforcement authorities in federal agencies and their belief that OLR should conduct "white collar-documentary" type cases in support of the FBI. They believed that sensitive investigative techniques should be the exclusive purview of the FBI and that the FBI was able and readily available to assist when these techniques were necessary. This reasoning ignored both Congress' desire that OLR take a more active role in labor racketeering investigations as evidenced by the Section 805(b) amendments to the Comprehensive Crime Control Act of 1984, and OLR's practical experience, which demonstrated that utilization of other law enforcement agencies was impractical and duplicative. Between 1984 and this year, DOL did not actively support statutory law enforcement powers for OLR agents. However, the 1990 DOL legislative program includes a proposal for statutory law enforcement authority for OLR investigators.

With respect to the Office of Investigations, OI has always enjoyed the cooperation of the U.S. Marshals Service in obtaining special deputation. However, the overall process has been a lengthy, awkward, and costly one which has been unresponsive to the needs of OI's investigative mission.

While OI has had little difficulty in obtaining Special Deputy authorization for Special Agents (SA) on protective assignments for the Secretary of Labor, considerable problems have arisen with regard to deputation for specific cases. This generally has been caused by the lack of advanced warning in instances where deputation is sought in specific cases, by the need for immediate response in those cases, and by the brief durations of the authorizations granted for investigation of specific cases.

Case specific special deputation is obtained through an awkward, time consuming, and costly arrangement; generally, as follows:

1) The SA on recognizing the need for deputation, i.e., to serve an arrest or search warrant, or because of threats, or perceived threats, made against themselves or witnesses, must write a request for such authorization, justifying the need, time needed, duration, etc., and stating that the prosecutor handling the case concurs with the request.

2) The SA's request is transmitted to the Regional Inspector General for Investigations (RIGI); sometimes from remote locations.

3) After review and concurrence, the RIGI transmits the request to OI Headquarters (HQ).

4) OI/HQ reviews the request and, given its concurrence, forwards the request to the DOJ for authorization.

5) DOJ reviews the request and transmits it, along with a questionnaire, to the Assistant United States Attorney (AUSA) who has been assigned responsibility for handling the case.

6) The AUSA reviews the request, comments on the need for the deputation, completes the questionnaire, and returns it to the DOJ.

7) Frequently DOJ asks the agency for further justification, including recently an analysis of

why its investigation is within bounds of the OLC Kmiec opinion.

8) After a series of clearances within DOJ, the Deputy Attorney General advises the Marshals Service in the requesting SA's jurisdiction of the DOJ approval.

9) The Marshals Service then contacts the RIGI and makes an appointment with the SA to be deputized. Frequently the Marshals Service has a backlog of requests and there are delays in processing. If the request is not approved, the SA has to find some other means of obtaining his objective.

Because of these problems, SAs have often sought assistance from Deputy U.S. Marshals, Postal Inspectors and FBI SAs. State and local law enforcement personnel have been used in emergency cases. While all of these methods have sometimes worked, none are reliable or cost effective and many unnecessarily increase the risk involved for those participating, i.e., a Deputy U.S. Marshal may serve a search warrant, but does not understand the case, requiring an unarmed OI SA without law enforcement powers to be present to provide technical assistance in the search and make the inventory of seized articles. In that situation, the principal function of the deputy is to secure the premises in order to promote a safe environment for the OI SA to do the actual work. In some cases the opportunity to obtain evidence has been simply lost or evidence itself has been destroyed due to the inability of the SA to obtain the needed authorizations or cooperation of other enforcement agencies in a timely fashion. In addition, unarmed SAs frequently have to accompany a Deputy U.S. Marshal during an arrest in order to identify the individual to be arrested. This places the unarmed SA in a potentially dangerous situation.

In 1989, OI submitted only nine case specific requests to the Justice Department for special deputation, largely because of the cumbersome mechanism involved in obtaining such authority. Eight were approved and one was denied. An average of over two months was required before approval was authorized.

Special deputations for criminal investigators assigned to protective assignment for the Secretary of Labor have lasted for varying periods of six months to a year, whereas deputations authorized for specific cases have ranged from as little as a few weeks to as long as a year in duration.

Other Concerns

1. Should the authority to execute judicially approved search and arrest warrants be given IG personnel?

Full law enforcement authority should be statutorily given to OLR and OI criminal investigators. These investigators are classified in the OPM GM/GS-1811 series--the same job series under which law enforcement officers from the FBI, DEA, Secret Service, ATF, etc., are classified. They have received the same training as their counterparts in the traditional law enforcement agencies. Full law enforcement authority includes carrying a firearm, making arrests, and executing search warrants. Search warrants prevent the destruction of evidence and frequently reveal information not previously suspected. The inability to make arrests and conduct searches in a timely manner impedes the effectiveness and efficiency of the agents' mission. I do not believe, however, that law enforcement authority should be extended to auditors or others who are not classified in the 1811 series.

2. What is the estimate of personnel years expended on providing protective services and the authority for providing such services?

Protective services provided to the Secretary of Labor over the past five years have varied greatly with each appointee, and sometimes within each appointment. At present, no services are provided to the Secretary of Labor at her request.

Data is currently unavailable on the time spent on protective functions as such records were not uniquely captured during the 1985-87 time frame. However, for portions of that time, OIG provided two special agents for the Secretary for daytime protection and for travel. In 1988, 8593 hours or 4.13 personnel years were devoted to protective services. In 1989, 1454 hours or .70 personnel years were devoted to protective services.

As earlier noted, protective services for the Secretary of Labor have been accomplished under authority granted as Special Deputy U.S. Marshals.

3. What is the impact of the OLC memoranda on your ability to complete your mission?

The OLC Kmiec opinion directly impacts this agency and even if DOJ eventually modifies its opinion, we believe it would still affect us. As we have testified in prior hearings, we have had to stop work on numerous cases and in certain program areas because of concern over the possible liability of our agents. As I specifically stated in my testimony before this Committee on

October 3, 1989, "if the DOL Inspector General is not allowed to conduct criminal fraud investigations involving the Department's 'regulatory' programs or involving a DOL program which is not entirely funded by Department dollars, then the public will be ill-served and the American working force will be the losers." (Page 10 of Attachment 4).

I believe it is prudent from the perspectives of economy, efficiency, and just plain good government to allow OIG to investigate fraud and corruption in those agency programs which are not directly funded by DOL. The DOL IG cannot fully carry out what I believe is its mission under the restraints of the Kmiec I memorandum. I believe legislation is essential.

Sincerely,

Raymond Maria

RAYMOND MARIA
Acting Inspector General

Attachments
1. Examples of problems when agents have no law enforcement authority
2. Letter from Senate members to the Attorney General
3. Testimony of Raymond Maria

Attachment 1

Set forth below are illustrative examples of past experiences where the lack of law enforcement authority by USDOL OIG SAs has adversely affected investigations or placed the assigned SA or a witness in possible jeopardy:

A. INSTANCES WHERE THE SAFETY OF OIG SAs OR WITNESSES WERE PLACED IN JEOPARDY:

1. SAs assigned to the Manhattan Organized Crime Strike Force were the primary investigators in a joint probe of organized crime/labor racketeering in the Fulton Fish Market. The investigation required extensive work during the hours of darkness (between midnight and 6:00 a.m.), the busiest period for market activity. Nails, fish and firecrackers were thrown at the SAs; one subject threatened the SAs with bodily harm. While serving a subpoena, the unarmed SAs were forced to retreat when confronted by 15 to 20 men armed with bailing hooks. One SA received threatening calls at his home. A key OIG witness was shot and wounded while going to his place of business at the market. The incident prompted Strike Force Attorneys to order a security team for the witness who was in the hospital. Because OIG Agents lacked law enforcement authority, their effectiveness with the witness was severely limited.

2. Incident to a criminal investigation in a Summer Youth Program in Chicago, Illinois, two SAs parked their unmarked government car at a youth employment center, in one of the highest crime areas in the city. During interviews, several youths and some staff members made threatening gestures and verbal threats to the Agents. When the SAs returned to their car, they found it severely vandalized. While the SAs contacted a towing service, a crowd gathered, led by a center staff member who began verbally inciting the crowd. Fearing for their personal safety, the SAs had to seek the assistance of the Chicago police Department for back up.

3. In another case, SAs needed to meet with and escort a witness in the Federal Witness Security Program. Even though the witness had been indicted for murder, was known to be a "hit man" for organized crime, and there were alleged murder contracts on his life, SAs could not carry firearms to protect themselves or the witness.

4. SAs working a joint nationwide investigation of numerous incidents of bombing and arson in connection with a Teamsters' union organizational drive were threatened by subjects who were known to have a propensity for violence and to carry firearms. In one instance, a subject threatened to kill an OIG SA and his family and burn down their home. In another, a subject pointed a rifle at an SA during an interview. Further, two SAs were jumped and beaten by three union officials who knew the agents were unarmed (This happened while attempting to serve a grand jury subpoena in a union hall and the local police were summoned).

   Also, various employers' trucks were followed by individuals using air surveillance and radio contact and shotguns were fired into the cabs of some of these trucks. During the investigation, one of the subjects also assulted and severely beat an OIG witness with a hammer.

5. A case investigated in the Philadelphia area required an SA to work in an undercover capacity as a roofer for a non-union company. Because non-union roofers had been subjected to various acts of violence (fire-bombings, shootings, assaults, etc.) by labor racketeer union organizers, the agent requested permission to carry a firearm for his own protection. When his request was denied, backup assistance was required from other law enforcement agencies in order to complete the investigation.

6. During investigation of a Teamsters' local business agent in Southern Illinois, it was learned that he had killed a known St. Louis "hit man". Also, it was learned there was an ongoing feud between another officer of the local and a prominent St. Louis gangster over control of the "rackets" in East St. Louis, IL. Given that background, SAs were required to conduct their investigation in extremely dangerous areas of East St. Louis at irregular times, but were unable to afford protection to themselves or witnesses in the case despite threats made against potential OIG witnesses by a union official.

7. An undercover operation by two SAs succeeded in the infiltration of an organized crime hangout frequented by a powerful labor racketeering figure. However, while the SAs were able to get quite close to the subject, the operation was eventually terminated because of a lack of security for the SAs involved and

the degree of safety for the SAs had reached an unacceptable level.

8. During one investigation, a SA and an Organized Crime Strike Force Attorney were interviewing truck drivers who were members of Teamsters Local 326, Wilmington, DE, at a motel in a remote location. SAs observed one of the drivers wearing a weapon. In the course of the interviews, the driver revealed that he felt a need to carry a gun for protection. He related to the SA that some of the drivers being interviewed were dangerous and the motel was under surveillance by those loyal to the subject, the local president. Moreover, one of the subjects belligerently told the SAs he knew they could not arrest him.

9. Prior to a Federal trial in Charleston, WV involving a USDOL Program violation, an informant told an OIG SA that the defendant carried a firearm and would probably bring it to the trial. The SA alerted the AUSA and the U.S. Marshals. When the defendant arrived in the court, he was searched and a loaded hand gun discovered. The defendant was convicted on 11 counts of black lung misrepresentation. Additional Federal and State charges, for carrying a loaded concealed weapon, were also filed.

10. During the investigation of a Comprehensive Employee Training Act (CETA) theft case, SAs interviewed a subject in her home. During the interview, the subject's husband became angry. The subject stated that her husband "was not easy to deal with in the morning." Aware that a potentially dangerous situation was developing, the SA ended the interview before it was fully completed because the agent was unarmed and unable to protect himself.

11. SAs, while conducting an investigation on an Indian Reservation, needed to call the Marshals in order to apprehend a subject. After the Marshals left with the subject, SAs attempted to dispose of the subject's auto but an angry group of Indians blocked the roadway and threatened the SAs with bodily harm.

12. During a joint investigation with the Naval Investigative Service (NIS), SAs attempted to interview the subject but he became abusive. Subsequently it was learned that the subject was a convicted felon. Later he was arrested for possession of a loaded firearm and second degree larceny. He subject had also been charged with rape, failure to appear in court, and was in fugitive status.

B. INSTANCES WHERE THE ADMINISTRATION OF JUSTICE WAS ADVERSELY AFFECTED OR IMPEDED:

1. A grand jury witness reported to our SAs that he was offered a $10,000 bribe by one subject to change his testimony. The witness was willing to meet with the subject and agreed to consensually record the bribe attempt (this is the most desired investigative technique in bribery cases). Potential evidence, however, could not be gathered because no agency personnel with law enforcement authority were available to supply protective backup for the witness.

2. In a joint investigation with the Federal Protection Service (FPS) involving stolen USDOL employee identification cards used in a scheme to cash bogus checks, the U.S. Attorney's Office authorized the arrest of the subject. The subject was known to be armed and dangerous. However, at the appropriate time for the arrest, the FPS detective assigned was unavailable. The U.S. Attorney requested that the OIG SA make the arrest. Although the SA was deputized, it was only for another investigation. The arrest had to be delayed because deputation was only on a case by case. basis. This was a significant theft-fencing-drug related investigation.

3. In a CETA Program investigation, our SAs discovered that 8 sub-contractor employees had criminal records for assault and related crimes and that three were still on probation. Interviews with the 8 employees had to be conducted with an armed Federal Law Enforcement Officer present. In addition, OIG had to seek FBI protective assistance for a witness who wore a consensual monitoring device during a potentially dangerous meeting.

4. While investigating a CETA conspiracy case in Stamford, CT, OIG SAs required the assistance of armed Immigration and Naturalization Service Agents to conduct witness interviews. Also, the Assistant U.S. Attorney (AUSA) asked the OIG SAs to provide protection to a witness who had received threatening telephone calls and to serve a search warrant for the seizure of corporate records. They could do neither because they lacked full law enforcement authority.

5. A State prisoner with sensitive information regarding high level State officials sought to cooperate with OIG Agents. However, he could not be placed in the custody of OIG Agents because they were unarmed. The Chicago

Strike Force expressed serious doubts that OIG Agents could effectively control the prisoner during movement to an interview when they were unarmed.

6. During OIG surveillance of the members of three organized crime dominated union locals who were picketing a Chicago racetrack, labor violence repeatedly broke out. The Illinois Department of Law Enforcement, working with OIG SAs, was called upon to restore order and protect the lives and safety of people on the scene. The State Agents expressed surprise and dismay when told OIG SAs had no weapons. Shortly thereafter, the State approached another law enforcement agency with additional information on the labor unions and ceased working with OIG SAs.

7. In Chicago the Interstate Commerce Commission (ICC) contacted the OIG to initiate an investigation. The investigation required a significant undercover activity which the OIG designed. When the ICC determined that the OIG was unable to provide security and backup for the undercover activity, it then sought additional assistance from the FBI. The ICC did this even though it stated a preference for working with the OIG. The FBI then refused to work this case with OIG SAs because they could not provide protection for undercover agents, informants and surveillance teams. The OIG was asked to stop all of its investigative activities in this matter.

8. The subject of an OIG investigation had been convicted for criminal assault. In addition, witnesses against the subject had lengthy criminal records. During the course of the trial, the AUSA received two death threats. Prosecution efforts were hindered because the AUSA would not let the OIG SA serve trial subpoenas because he was not armed. Armed law enforcement personnel from another agency had to be enlisted to serve the subpoenas.

9. An investigation in the Los Angeles area required conducting interviews of CETA participants, all of whom were ex-convicts living in a high crime area. The subject was known to be armed and was previously convicted of armed robbery. The L.A. Sheriff's office had to execute a search warrant on the case because OIG had no authority to do so.

10. During an investigation, OIG employees were threatened when they attempted to obtain records. The Marshals Service had to be enlisted to serve a subpoena for the records. The day prior to the service of the subpoena,

the building where the records were located was sprayed with automatic weapon fire. Additionally, the brother of the subject, a reputed member of the Mexican Mafia, was killed during the investigation.

11. During a FECA investigation, OIG learned that the subject had been convicted of bank robbery and received a 15 year sentence. The sentence was commuted in exchange for cooperation in a murder case. The subject was also a gun collector. The AUSA advised the OIG SA to take an armed law enforcement officer when she interviewed the subject. During the interview, numerous weapons were observed. After the interview, ATF Agents and the sheriff searched the subject's residence and confiscated 12 firearms. The AUSA was dismayed to learn that it was necessary to use local and other Federal Law Enforcement officials to execute the search warrant because OIG did not have full law enforcement powers.

DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of Inspector General
Washington, D.C. 20201

MAR 7 1990

The Honorable John Glenn
Chairman, Committee on
  Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This is in response to your very welcome letter of February 2, 1990, in which you requested information concerning certain impediments to the effective accomplishment of the mission of the Office of Inspector General (OIG). We recognize that these issues -- namely law enforcement authorities, and recent Department of Justice (DOJ) opinions circumscribing OIG authorities -- are controversial ones. However, we also believe that they are critical to the ongoing success of the Inspectors General (IG) in addressing fraud and abuse in their respective agencies. Therefore, we welcome the opportunity to provide you with the material you requested.

Your first inquiry addresses the issue of inconsistent grants of law enforcement authorities throughout the IG community, and the adequacy of deputation as a remedy for the lack of such powers. Each of your questions is restated and answered individually, below.

> **Question A. Does your agency's governing statute permit IG personnel to carry weapons? If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.**
>
> **Question B. If your answer to question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?**

No statute specifically authorizes criminal investigators of the OIG at the Department of Health and Human Services (HHS) to carry firearms. The need for firearms authority is described in the answer to question C, below.

Question C. If you lack such firearms authority, please describe any problems this has caused in performing your mission. Please provide any specific instances where IG personnel may have been unnecessarily placed in danger as a result.

First and foremost, lack of firearms authority has exposed agents of the OIG to danger. These investigators regularly conduct surveillance, undercover operations, consensual monitoring of telephone and non-telephone conversations, use confidential informants, serve subpoenas, and assist in the execution of search warrants. These activities often result in contacts with suspects in volatile situations. The OIG agents have been threatened and assaulted, and have participated in searches and other activity where firearms were displayed. The OIG agents have interviewed and surveilled suspects and witnesses with extensive criminal records--some with records of assaults on law enforcement officers.

Many OIG fraud cases overlap with more serious traditional violent or "street crime." For example, nearly all of our investigations of suspected sale or counterfeiting of false Social Security Administration (SSA) account number cards also involve smuggling illegal aliens, false identification and forgery or confidence schemes. Several of our medical provider, pharmacy and drug diversion investigations have overlapped with narcotics trafficking and organized crime activity. Because of these connections, we have participated in many multi-agency task forces, investigations, and undercover projects.

In some cases, necessary investigative activity has been delayed, or foregone entirely because of danger to our investigators. We have been counseled by prosecutors and fellow law enforcement officers not to enter certain areas to conduct interviews without armed personnel present. Witnesses, too, have been reluctant to cooperate with us since we cannot offer them necessary protection. During our investigations, we have had OIG agents or witnesses who were threatened or assaulted, and in one instance, an OIG special agent was kidnapped and held at gunpoint.

Examples of the above situations in which OIG agents, witnesses, operatives and even the public were placed at risk are included in Enclosure A.

Question D. What additional training and expenses would be included if firearms authority was provided to IG personnel?

If the OIG special agents were granted authority to carry firearms, we believe that the added expense would be nominal. The OIG would necessarily incur an "up-front" expense for acquisition of firearms and related equipment. In addition, OIG agents would be provided periodic training in arrest issues, and firearms safety and qualification. This regular refresher training could be merged into existing training programs at minimal cost.

As you recognize in your letter, all OIG criminal investigators have attended the Criminal Investigator Basic Training Program at the Federal Law Enforcement Training Center (FLETC) in Glynco, Georgia, or an equivalent course (such as the New Agents' Training Course sponsored by the Federal Bureau of Investigation (FBI)). Each agent must successfully complete all portions of the training including firearms proficiency. More than 40 percent of OIG agents have prior experience in agencies such as the FBI that enjoy full law enforcement powers.

At present, OIG has at least one federally trained and qualified firearms instructor in all but one regional office. These instructors support the current firearms qualification requirements imposed under rules pertaining to special deputation as United States (U.S.) Marshals. Each region also now provides yearly in-service training to criminal investigators and could easily integrate refresher training in arrest techniques and laws into such training. It would require minimal expense to incorporate routine quarterly firearms safety and proficiency qualifications into these existing training programs.

> **Question E. What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)**

The OIG would be willing to exercise law enforcement powers pursuant to guidelines specifically reviewed and approved by the Attorney General. We envision that such guidelines would include the following:

- -- Firearms will be carried by OIG agents only while conducting investigative activities that are deemed by the Regional Inspector General for Investigations (RIGI) (or equivalent senior OIG Headquarters official) to be potentially dangerous.

- -- All firearms and ammunition will meet OIG specifications.

- -- Firearms and ammunition will be approved by Headquarters;

personally-owned firearms may not be used unless they meet OIG specifications, the weapon has been certified as serviceable by a qualified range instructor, and the special agent has prior authorization by the RIGI or equivalent senior OIG Headquarters official.

-- The RIGI will maintain a secure weapons locker and a weapons log book which will include: the name, make and serial number of each weapon; date of issuance; signature of agent removing the weapon; signature of supervisor; file number; date returned and the condition of the weapon; signature of agent returning weapcn, and signature of receiving supervisor.

-- After issuance to an agent, it will be the agent's responsibility to provide adequate locked or personally-controlled storage for the weapon not being worn, as well as all ammunition. At no time will a weapon be stored in a desk or unlocked cabinet. Weapons will always be unloaded in a safe area prior to being placed in a storage repository.

-- Firearms will normally be stored at the agent's office at the end of each workday. With the approval of the RIGI, firearms may be taken home overnight or over a weekend when required for official purposes, or when it is impractical to return the weapon to the place of storage. The agent is required to use the utmost caution when a firearm is stored temporarily in a residence.

-- Loss or theft of an assigned firearm will be reported immediately to the RIGI, who will take necessary action to have the firearm listed in the National Crime Information Center, and will immediately notify OIG Headquarters of the loss or theft and the circumstances surrounding the incident.

-- Firearms will be used as defensive, not offensive weapons, and will be used only when the user reasonably believes that such use of deadly force is necessary.

-- Weapons will not be drawn unless the agent reasonably believes that their use may be necessary.

-- Firing at a fleeing felon will not be considered justified unless the agent has reasonable cause to believe that the person poses an imminent threat to the life of the agent or others.

-- Warning shots will be prohibited.

-- Agents will have their badges and credentials on their person when carrying a firearm. This requirement may only be waived by the Deputy Inspector General for Investigations (DIGI).

-- Agents will follow Federal Aviation Administration regulations when transporting or carrying firearms aboard commercial aircraft.

-- Weapons will only be carried in a concealable belt or shoulder holster, and any reference to the fact that the agent is armed will be avoided, unless necessary.

-- Agents will conduct themselves so as to preclude the possibility of accidental discharge of weapons or otherwise creating a hazard to innocent persons. Additionally, an agent will not engage in any activity which might impair the confidence of the public in the agent's judgment and professional abilities.

-- The OIG Headquarters will be responsible for monitoring compliance with these guidelines, and investigating alleged violations.

The OIG agents who have been deputized as special deputy U.S. Marshals have been successfully operating under the above guidelines since early 1988. We believe that these policies and procedures, when followed by agents who receive regular training in firearms use and safety, will continue to effectively minimize the possibility of unauthorized use, or misuse of a firearm by an OIG agent.

Question F.1. What is the procedure for obtaining authorization for appointment as a special deputy U.S. Marshal for your personnel? Which officials within your agency or at the DOJ must approve such deputations?

When a RIGI determines that special deputation is needed in a particular case, the RIGI notifies Headquarters. A formal request is drafted and approved by the inspector who is responsible for Grants and Internal Systems, the Chief Inspector, and the Assistant Inspector General for Criminal Investigations. The request is given final approval and signed by the DIGI, and is forwarded to the Deputy Assistant Attorney General in the DOJ. Typically, it takes less than 3 days to draft a request for deputation, obtain appropriate clearances, and forward the request to the DOJ.

It is our understanding that after the request is received by DOJ, it is referred to the appropriate office within the Criminal Division (or other DOJ component for matters outside the purview of the Criminal Division). The Criminal Division (or other DOJ component) reviews the request, and forwards a recommendation for approval or denial to the Associate Deputy Attorney General who reviews the recommendation, approves or denies it, and forwards it to the Deputy Attorney General for a final decision by DOJ. The Deputy Attorney General then forwards the recommendation to the U.S. Marshals Service (USMS). Officials of the USMS are responsible for either deputizing agents in cases where deputations are approved, or for notifying OIG in cases where our requests have been denied.

Question F.2. On average, how long does the process for reviewing requests for these appointments take?

The DOJ has taken an average of 3 months to review OIG requests for deputation. Currently, nine such requests are pending at DOJ. These nine requests have been at DOJ for an average of 4 months.

The DOJ has stated that they would accept requests requiring immediate handling, and would, if possible, review and render a decision by the date requested by the agency. We have sent two such requests for emergency deputation to DOJ, and another request was upgraded to emergency status after its submission. Of the three requests, none received DOJ approval by the target date. (Note, in one instance, the target date was extended and DOJ was able to grant approval by that extended date.)

Question F.3. How many requests for deputation have you sent to the DOJ during the last year? How many have been denied? For what reasons?

The HHS OIG submitted 36 requests for deputation to DOJ in 1989. Of these, 15 were approved, 10 were rejected, and 11 are in pending status. In addition, two requests for renewal were rejected.

Requests were denied for the following reasons: (1) in two cases, the investigation was in its early stages and DOJ opined that it was too early to determine whether subjects were dangerous and to speculate as to what investigative action would be taken; (2) in two cases, the DOJ did not feel that the subjects posed a particular danger; in one of these cases, DOJ also felt that a joint law enforcement agency could handle the law enforcement aspects of the investigation; (3) in two cases, the investigation had been completed while waiting for a decision from DOJ regarding the deputation request; and (4) in four cases involving programs of the Food and Drug Administration (FDA), the OIG withdrew from the investigation when the Secretary rescinded a delegation of authority to the OIG to conduct such inquiries. The two renewal requests were rejected because the DOJ was misinformed about the status of one investigation, and the Assistant United States Attorney felt that deputation was no longer warranted in the other.

Question F.4. Is there any avenue for reconsideration of denial of a request for deputation?

The DOJ will accept requests for reconsideration of requests for deputation that have been denied. The OIG has requested such reconsideration on only one occasion. The case involved a deputation renewal. Agents were deputized for this case in 1988, with deputation expiring on June 30, 1989. The DOJ recommended against renewal of the deputation. On August 9, 1989 the OIG submitted a request for reconsideration. This request is still pending in DOJ and has been in pending status for over 6 months.

Question F.5. I have been informed that "blanket authorization" was granted to criminal investigators of the Department of Interior for purposes of investigating Bureau of Indian Affairs matters. Under what circumstances are such "blanket" approvals granted? How many have been requested and how many have been granted since January 1, 1990?

The OIG has submitted one request for "blanket deputation" since January 1, 1990. The request was forwarded in early February and is currently pending at DOJ. The blanket request was for 15 OIG agents to be deputized for cases involving the Indian Health Service (IHS) and the Administration for Native American programs. We requested the deputation subject to the following conditions: (1) that deputation authority would apply only to those cases within OIG jurisdiction involving IHS and Administration for Native American programs; (2) approval to conduct the investigations would be received from the U.S. Attorney in the pertinent district; and (3) all agents receiving deputation would meet basic qualifications as required by the USMS would be fully trained at the FLETC or other approved Federal training centers, and would receive current firearms training.

Question F.6. Are requests that agents be deputized ever denied by the DOJ even though they have been requested by the pertinent U.S. Attorney's Office? For what reason would the DOJ override the recommendation of a U.S. Attorney's office?

On four occasions, the DOJ has denied requests for deputation that had been approved by a U.S. Attorney's Office. In one case, the U.S. Attorney agreed that some of the subjects of investigation had criminal records and were involved in drug and organized criminal activity. However, DOJ Headquarters stated that the subjects posed no significant danger, and that since the FBI was involved in the matter, the FBI could provide any law enforcement assistance needed.

In two other cases, the Assistant U.S. Attorney supported the need for deputation. However, DOJ stated that the subjects did not pose a significant threat to the agents.

In the fourth case, a project was initiated which was to be conducted jointly with the OIG and the FBI. Support for deputation of OIG agents was received from the Assistant U.S. Attorney. However, DOJ relied on information provided by the FBI that the project was in its early stages, and it was too early to determine whether a pattern of health care fraud existed, and what investigative activities would be conducted. It is interesting to note that the same project was being conducted in another judicial district where deputation was requested by OIG and approved by DOJ.

Question F.7. How long does a Marshal's appointment last? What is the procedure for renewal of a deputation? How long does this process take?

Deputations granted by the USMS generally expire on June 30 of each year, regardless of the date the agent was deputized. Therefore, the length of a special deputation may vary from 1 month to 1 year, depending on the date the agent was actually deputized.

Requests for renewal of deputations are prepared and processed under the same procedures as are initial requests for deputation. Those renewal requests submitted for the June 30, 1989 expiration date took an average of 2 months to have the agent deputized. The two renewal requests that are currently pending at DOJ are not reflected in this average. They have been pending at DOJ for 7 and 8 months respectively.

Your committee has also requested that we discuss whether the OIG at HHS should be granted express authority to serve search and arrest warrants. The answer is an unequivocal yes.

Authority to execute a search warrant is among the most important powers to be granted a criminal investigator. The DOJ has, itself, stressed that use of a search warrant, instead of a subpoena, is often extremely advantageous in an investigation involving fraud since

> "it [the search warrant] saves time and may substantially shorten the investigation; it may produce current, up-to-date evidence of a present violation; and it has enormous psychological impact on the perpetrators of the fraud. A great benefit is that a warrant does not allow the targets of the investigation time to alter or destroy evidence, which happens with documents requested through a grand jury subpoena. Use of a warrant also obviates any Fifth Amendment claim available to subjects when documents are subpoenaed."

(DOJ Bulletin on Economic Crime Enforcement, dated December 1982).

The above benefits are fully applicable in investigations of fraud against HHS programs. Often, the evidence that is most crucial to our fraud cases is documentary evidence -- claims filed under Medicare or Medicaid, fraudulent applications for benefits or services under entitlement programs, false grant applications and the like. These documents may easily be "lost," altered, or destroyed during the time allowed for return on a subpoena. In cases where such conduct is reasonably likely, a search warrant would be a more effective tool for gathering evidence.

Use of search warrants in lieu of Federal grand jury subpoenas also has the significant advantage of freeing the records for use in subsequent civil or administrative proceedings. Under Rule 6(e) of the Federal Rules of Criminal Procedure, the Government's use of grand jury material in other proceedings is greatly restricted. No such limitations exist on use of records seized pursuant to a search warrant. Thus, these records may more easily be used to obtain restitution or other civil remedies against wrongdoers.

Under current practice, when an arrest or search is called for in an OIG investigation, we must either seek deputation of an OIG agent as a special deputy U.S. Marshal, or rely on other law enforcement agencies for assistance in executing arrests and searches. Both of these "solutions" are unsatisfactory. As discussed above, the deputation process has a number of drawbacks. The appointment process is lengthy, requiring an average of 3 months to complete, and results in corresponding delays in the subject investigations. Requests may be denied by DOJ based on subjective determinations of need for the deputation. Further, deputations are limited in time, and after expiration, must be reauthorized through the above-described procedures. Deputations are also limited in coverage to the specific case for which the appointment was sought. Therefore, even after going through the lengthy approval process, the agent may only exercise authorities in the context of the one case.

Similarly, reliance on assistance from "traditional" law enforcement agencies is an inadequate remedy. The need for an arrest or search in any given case is unpredictable, and often cannot be scheduled in advance. As a result, we cannot always provide assisting agencies with sufficient notice to schedule the arrest or search. Moreover, the work of the "traditional" law enforcement agencies cannot immediately be set aside to accommodate our requests. This situation has resulted in significant delays in a number of our cases. Such delays are not mere inconveniences, but have resulted in failure to obtain necessary evidence, and have permitted suspects to avoid arrest for some time. We have enclosed summaries of instances in which arrests have been delayed due to the lack of full law enforcement authority. Enclosure B. We have also enclosed summaries of instances in which searches have been delayed. Enclosure C.

A second problem concerns the lack of technical expertise of many of the "traditional" agents. Few Federal programs are so complicated as are Medicare, Medicaid and the Social Security benefits programs. When outside agents have consented to execute search warrants in our behalf, they have occasionally requested that our agents -- who are unarmed and therefore not able to assist in protecting the premises or public -- not accompany them. In these circumstances, it is unreasonable to expect agents of other law enforcement organizations to possess or acquire the expertise necessary to conduct searches for evidence of violation of technical and complex rules under HHS programs. Thus, we have no assurance that all relevant evidence has been recognized and secured.

Certain investigations may be lost altogether because they do not meet the criteria of the FBI or other assisting agency. For example, among the cases that the FBI will traditionally not undertake are SSA recipient fraud investigations, and cases involving small financial loss to the Government. Unless we can obtain assistance from agencies other than the FBI, these cases cannot be pursued.

The need for an arrest or search during an investigation is not an isolated incident. There are nearly 4,000 investigations ongoing in the OIG, and any number of them could require a search or arrest at any time. The sheer volume of cases makes it difficult to expect other agencies to adequately meet our needs for authority to execute arrests and searches, and to carry firearms.

We believe that obtaining assistance from "traditional" law enforcement agencies in conducting our investigations is inefficient in other ways, as well. Each time these agencies provide us with help, it diverts law enforcement agents from their own statutory missions. It is no more reasonable or acceptable for their investigations to suffer extensive delays while they are assisting in our cases. Second, the presence of officers from other law enforcement agencies is often duplicative. The OIG typically has adequate resources to conduct a search or other investigative activity, yet the assisting agent must nonetheless accompany us to provide armed back-up. Authorizing OIG to exercise full law enforcement powers would eliminate this waste of resources and would ensure a more efficient and less costly allocation of critical law enforcement resources.

A final note with respect to search warrants. Since 1979, agents of the HHS Office of Investigations have been designated by the Attorney General as law enforcement officers for purposes of requesting the issuance of search warrants under Rule 41 of the Federal Rules of Criminal Procedure. Therefore, our agents already routinely act as affiants in obtaining warrants. The requested authority would grant these agents the added power to execute the warrants they have obtained. Given the complexity of these searches, the specialized types of evidence sought, and the need to conduct the searches without undue delay, we believe it would be most efficient to permit OIG to execute its own search warrants.

Your third inquiry concerns the provision of protective services for the Secretary by the OIG. Specifically, you asked for a description of any such services provided during the last 5 years, and the authority for providing such services.

The OIG did provide security and protection services to the Secretary of HHS during calendar year 1985, and for 2 months in 1986. Five full-time employees were assigned to this duty. The authority to provide Secretarial protection was delegated to the OIG by the Secretary under 5 U.S.C. 301 (which generally gives the Secretary authority to prescribe regulations for governance of HHS). On February 26, 1986, the Secretary approved the transfer of the security and protection services from OIG to the Office of the Assistant Secretary for Personnel Administration (ASPER). The responsibility for providing physical protection to the Secretary has remained in ASPER since.

Your fourth inquiry concerns two recent opinions issued by the Office of Legal Counsel (OLC) of the DOJ that seem to impose limitations on OIG audit and investigative activities. You have asked that we provide the committee with an assessment of the impact of these memoranda on our operations.

The OLC opinion dated March 24, 1989 states that "absent extraordinary circumstances, an Inspector General should not provide Congress with confidential information concerning an open criminal investigation." We were somewhat surprised by issuance of this OLC memorandum, since no IG had requested the opinion, and we know of no instance in which an IG has improperly provided any such information to Congress. In any case, we do not believe that this opinion will have a significant impact on our day-to-day operations. We have worked very cooperatively with oversight committees in fulfilling our statutory responsibility to keep Congress fully and currently informed concerning fraud and other serious problems relating to the administration of HHS programs. These committees have never demanded access to grand jury information or other confidential data pertaining to open criminal investigations. We anticipate that these cooperative efforts with Congress will continue.

In contrast, the second OLC opinion, dated March 9, 1989 has already impaired OIG operations. This office has always understood our authorizing legislation to require us to investigate all fraud by or upon programs of HHS. Moreover, Department officials have come to rely upon the OIG, as the only criminal investigators within HHS, to "handle" fraud in agency programs. With the OLC opinion, the OIG authority to investigate fraud has been reduced to fraud involving Department employees, contractors, grantees or other recipients of Federal dollars. This opinion has, and if not amended or withdrawn, will continue to seriously impair criminal enforcement in HHS operations.

As you know, the most publicized difficulties concern investigations of criminal violations of the Federal Food, Drug and Cosmetic Act. The OIG has conducted such investigations when requested to do so by the FDA or the DOJ. This working relationship was formalized first in a Memorandum of Understanding between FDA and OIG, and later by delegation from the Secretary upon an express request of the Commissioner of FDA, the IG and the General Counsel.

Cases worked by the OIG involved: (1) fraud and misrepresentation by applicants for a benefit from or approval by the FDA, (2) sale of counterfeit drugs, (3) illegal distribution of anabolic steroids, and (4) drug diversion. These matters do not necessarily fall within the narrow investigative jurisdiction defined by the OLC.

The DOJ has advised HHS that the OIG has no authority to conduct criminal investigations in the FDA area unless the matter specifically involves misconduct by employees of the Department or fraud by a recipient of Federal funds. In addition, we were specifically warned by officials of the DOJ Office of Consumer Litigation that continued investigation of FDA cases by OIG employees would place our special agents in jeopardy of personal tort liability. In response, we withdrew from all FDA-related investigations.

Currently, we have specifically requested that the DOJ provide us with written guidance as to what FDA matters may lawfully be investigated by the OIG. We have also asked to be advised concerning how to handle matters that involve both FDA offenses, and violations of other program statutes that clearly fall within the investigative jurisdiction of the OIG (such as Medicaid fraud). Until such time as we receive an express statement of our jurisdiction from the DOJ, we feel that we have no choice but to protect our agents by not investigating FDA matters.

The FDA is only the most prominent area of investigation that has been thrown into question by the OLC opinion, but it is not the only one. There are numerous other law enforcement authorities which are the responsibility of our agency to administer, which cover persons who are not Department employees, grantees or contractors. Examples include:

- "Kickback" investigations - for example, where a medical device manufacturer such as a maker of intraocular lenses is prohibited from offering kickbacks to hospitals or physicians where Medicare ultimately covers the cost of the cataract surgery, even though the manufacturer has no relationship with our Department;

- "Misuse of Symbols" investigations - it is illegal for a private company to use the terms "Social Security" or "Medicare" in advertisements, where the purpose is to induce the audience to believe the company is affiliated with the Federal Government; pursuant to a delegation from the Secretary, the OIG has been responsible for investigating potential violations of this provision;

- Violations of the Clinical Laboratories Improvement Act, which regulates laboratories through a certification mechanism under which they must meet certain standards, permit inspections, submit reports, make records available and submit to proficiency testing. The Department may impose civil and administrative sanctions against offending laboratories. The statute also authorizes criminal penalties for persons who intentionally violate these provisions. Suspected violations have been investigated by the OIG, even though the laboratory may receive no Federal dollars.

- Counterfeiting, forging or misusing a Social Security card or Social Security account number in order to obtain a benefit other than Federal dollars (such as a credit card, a passport, employment, and the like.) Potential violations have, to date, been conducted by the OIG.

In addition, at HHS, the OIG has been delegated a number of responsibilities for enforcement of Medicare program laws. For example, the IG is responsible for imposing penalties in situations where physicians charge their Medicare patients in excess of their fee freeze amounts, and where nursing homes violate health and safety standards. Again, the violations involve program statutes where the underlying offense is not related to misuse of Federal funds.

Given the breadth of responsibilities assigned to the vast HHS, we are certain that there are literally dozens of other categories of investigations involving programs and operations of HHS that might be called into question under the narrow OLC opinion. When these situations are encountered, we are seeking clarification of our jurisdiction whenever possible. However, because this problem is repeated in all OIG's throughout Government, we believe that the only "solution" would be for DOJ to significantly limit the scope of the OLC opinion, or for Congress to provide legislative clarification. We hope that either remedy would reject the narrow view that statutory IGs do nothing more than police the expenditures of Federal dollars, and recognize our important role in ensuring the integrity of Federal programs, and the welfare of the countless beneficiaries served by those programs.

A final note. On April 13, 1989, the OIG of the HHS sent a package to the DOJ requesting that DOJ endorse a legislative proposal that would extend certain law enforcement powers to the OIG at HHS. A copy of this comprehensive request is enclosed at Enclosure D. As of today, we have received no response or reaction from DOJ at all.

Thank you for the opportunity to provide you with the above information and comments. If you have any questions or would like additional information, please do not hesitate to contact me.

Sincerely yours,

Richard P. Kusserow
Inspector General

4 Enclosures

U.S. Department of Housing and Urban Development
Washington, D.C. 20410-4500

OFFICE OF INSPECTOR GENERAL

MAR 7 1990

Honorable John Glenn
United States Senate
Chairman, Committee on
Governmental Affairs
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This is in further response to your letter of February 2, 1990, concerning various law enforcement issues affecting our investigative staff.

We thank you for giving us the opportunity to respond to an issue which is of great concern to us. I strongly favor receiving full law enforcement authority. In my nineteenth Semi-Annual Report to Congress, I asked that the Senate give favorable consideration to S. 1975, the Comprehensive Federal Law Enforcement Improvements Act of 1987. Although this bill did not pass, I am hopeful that S. 2080, the OIG Law Enforcement Authority Act of 1990 (introduced on February 7, 1990), will be enacted. It is extremely important that we be given the necessary tools to carry out our mandate to prevent fraud, waste, and abuse in the government in the most efficient way possible.

Since your letter contained several questions, we will attempt to answer them in the same order as presented.

A. Special Agents of HUD's Office of Inspector General (OIG) do not have statutory authority to carry weapons.

B. N/A

C. The following, including Subparagraph F, are recent examples which demonstrate that lack of full law enforcement authority hinders not only our ability to function, but may also seriously impact on the outcome of the investigation. In addition, lack of full law enforcement authority affects the workload of other agencies, such as the FBI, which are called upon to provide assistance, which would otherwise be unnecessary.

Case 1 - An investigation of a large multifamily housing project in Boston, Massachusetts, required the issuance of a search warrant to gain access to records. Since we do not have the authority to execute search warrants, coordination had to be made with the FBI to physically perform the search. In addition, several people to be interviewed by our agents are known in criminal circles and are subjects of local murder investigations. Lack of firearms authority presents a clear danger to the safety of our agents.

Case 2 - Investigation of a fraud case in Alma, Georgia, involved the interview of a subject who was on parole after a conviction for armed robbery. Subsequently, he was arrested on battery charges. The agent performing the interview was not authorized to be armed.

Case 3 - Investigation of a Denver, Colorado, HUD employee suspected of embezzling $500,000 identified an account where the money was believed to be held. The U. S. Attorney's Office requested that search warrants be issued to facilitate seizing the assets. Because we have no such authority, the FBI was called in to execute the warrants.

Case 4 - In a case involving the attempted bribery of a HUD employee, a cooperating witness agreed to meet the subject and wear a recorder. The meeting had to be postponed several times because it was necessary to have an FBI agent available to protect the witness. Protection could just as easily have been provided by OIG agents if they had the ability to carry weapons.

Case 5 - An Assistant U.S. Attorney in St. Louis, Missouri, requested that one of the indicted targets in a large-scale tenant fraud scheme be served with an arrest warrant. In order to fulfill this request, we had to use the U.S. Marshal's Office so that the arrest could be made.

D. Upon receipt of firearms authority, our office would first require that every agent be retrained and qualified with their weapons. Thereafter, periodic range fire qualification for each agent would also be necessary. Since our field offices average less than 7 agents, we would make arrangements with other federal, state, or local authorities to use their range facilities. Normally, use of such facilities are provided free as a professional courtesy; however, even if there was a charge, we feel it would be minimal. There would, of course, be costs associated with the purchase of weapons and ammunition. Annual refresher courses on the law as it pertains to search and seizure, arrests, and similar law enforcement activities would also be required. Costs would be kept down by sending the instructor to the field offices and/or by incorporating the training into other regularly scheduled agent conferences. We would also need to have several of our personnel trained as firearms instructors.

E. Typically, the use of firearms would be restricted to those times when an agent can articulate the need to carry a weapon, such as executing a search warrant, making an arrest, or working in an environment where the safety of the agent may be in question. Weapons would not normally be carried in an administrative environment, such as local HUD offices.

F. As described below, there has been only one instance where we actively sought deputation as a Special Deputy U.S. Marshal to carry out law enforcement activities. Because our agents do not have authority to carry weapons, they have not maintained their proficiency in using them. From a liability standpoint, we would not feel comfortable arming an agent for a specific activity unless he/she had recently qualified at an approved range fire exercise. Typically, when the question of deputation comes up, it is in response to a pressing situation with little time available to arrange for proper qualification.

The one instance where we applied for Special Deputy U.S. Marshal status occurred in Los Angeles, California. An OIG agent conducting an equity skimming investigation developed information that records which could substantiate the fraud were located at the subject's residence. The Assistant U.S. Attorney (AUSA) handling the case recommended that a search warrant be obtained to secure the records and prevent destruction. After obtaining approval from my office to proceed, the AUSA sent a request for Special Deputation of the OIG agent to the Deputy Director, U.S. Marshal's Service, McLean, Virginia, on November 9, 1987. By November 21st, there was still no word from the Marshal's Service on the application. Because time was of the essence and there was fear that the records would be destroyed, an FBI agent was used as the affiant for the search warrant, which was drafted by our agent. The warrant was then executed on November 22, 1987 and the records were seized with our assistance.

The above are but a few examples of several other instances whereby our investigative efforts were hampered or otherwise delayed because we do not have full law enforcement authority. Although we believe we are getting the job done, we have often had to wait for the FBI or the Marshals to find the time and the agent(s) to assist us with a search warrant execution. Even this is quicker than seeking Special Deputation.

HUD's OIG provides protective security services only to the Secretary of HUD. These services are primarily performed in connection with out-of-town Secretarial travel. The final decision as to whether the Secretary will be accompanied by OIG agents rests with the Secretary. These agents have received training on protective security from the Secret Service and have also been granted Special Deputy U.S. Marshal status.

A decision by the Comptroller General, B-171490, dated January 7, 1976, states that agency funds are available to provide protection for the Secretary of HUD. The recent HUD Secretaries have asked for the OIG to provide protective security.

The amount of time devoted to protective security can vary significantly, depending upon the amount of planned travel and the level of required protection. Based upon a Staff Year of 261 days, the OIG has expended the following amount of time protecting the Secretary from 1986 through 1989 (data for 1985 is not available):

1986	.45	Staff Year
1987	.23	" "
1988	.79	" "
1989	1.30	" "

We anticipate that time expended on protecting the Secretary will vary between 1.25 and 1.75 staff years for the next two to three years.

I do not agree with the Office of Legal Counsel opinion of March 9, 1989 ("Kmiec I"), which seeks to impose limitations on Inspector General audits and investigations. Congress, in Section 6(a) of the Inspector General Act of 1978 (the Act), gave us a clear grant of independent, discretionary authority, to wit: we are empowered "to make such investigations and reports relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable..." (emphasis added).

"Kmiec I" interprets the inherent investigative authority of the OIG under the Act as covering agency employees, contractors, grantees, and other recipients of Federal funds from the agency. This decision may have far reaching implications for the IG community. In HUD's case for instance, if "Kmiec I" is taken literally, we could be enjoined from investigating equity skimming violations. As you are aware, equity skimming is a major problem facing HUD's single family mortgage insurance program, yet the equity skimmers receive no Federal funds. What other law enforcement agency would have as strong an interest in developing this type of case--or in reporting the abuses to Congress so that it is kept abreast and can act knowledgeably in the matter? Since we began keeping statistics on equity skimming, we have conducted investigations which resulted in 61 individuals being charged with this violation. We have also recovered $1,955,732 in fines and restitution. This is a continuing problem to the Department and we have several ongoing investigations throughout the country.

Let me reiterate my support for full law enforcement authority for the Offices of Inspector General. We are being asked to do much more than ever before, even though we are in a period of increased budgetary and manpower constraints. Throughout the country, we--the IG community--are working side by side with the FBI in all sorts of investigations. We go into the same areas, interview the same people, and conduct similar investigations--yet we do not have all the tools necessary to do our job. This needs to be corrected.

Should your staff have any questions concerning this response, please have them contact Patrick J. Neri, Assistant Inspector General for Investigation, at 755-6390. We look forward to assisting you in any way possible.

Sincerely,

Paul A Adams

Paul A. Adams
Inspector General

U.S. Department of Transportation
Office of the Secretary of Transportation

The Inspector General

Office of Inspector General
Washington, D.C. 20590

MAR 14 1990

The Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your recent letter requesting information and replies to specific questions put forward by the committee concerning legislative action to grant law enforcement authority to Inspector General personnel.

I strongly endorse and approve proposed legislative initiatives which would provide full law enforcement authority for special agents employed by the Inspectors General. I believe that legislation such as that proposed in Senate bill S. 2080 and that submitted by Congressman Staggers on March 1, 1990, would eliminate many of the operational impediments encountered by our criminal investigative personnel on a daily basis. Even before the respective Senate and House bills were introduced, this Department drafted and submitted to the Office of Management and Budget its own legislative proposal to gain full law enforcement authority for Office of Inspector General investigators. In addition to responding to the questions of the committee, I have enclosed a copy of that proposal for your information. I am sure you will note how similar the Department's proposal is to the Senate and House initiatives.

We have prepared the enclosed discussion paper which details our responses to your questions. I am also offering my assistance as well as that of my staff to you for any followup information, should such be needed.

The committee's favorable consideration of the proposed legislation is of vital concern to us. Its enactment would remove obstacles we now face in accomplishing our mission and allow us to meet our responsibilities in the most efficient, effective, and economical manner possible.

Sincerely,

Raymond J. DeCarli
Acting Deputy Inspector General

2 Enclosures

U.S. Department of
Transportation

General Counsel

400 Seventh St. S.W.
Washington D.C. 20590

DEC -7 1989

The Honorable Richard G. Darman
Director, Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Darman:

Enclosed are 10 copies of a draft legislative proposal

> To authorize employees within the Department of Transportation's Office of Inspector General who investigate violations of Federal criminal laws to exercise various law enforcement authority.

Also enclosed are a draft background and section-by-section analysis and transmittal letters to the Congress. We note that the Department has reviewed this proposal in relation to the Department of Justice's "Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority," June 29, 1984, and finds that it is in substantive compliance with these guidelines.

The Department has analyzed this proposed legislation in accordance with the principles and criteria contained in Executive Order 12612. As a result of this analysis, the Department has determined that the proposed legislation does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

Your advice is requested as to whether there would be any objection to the submission of this proposed legislation to the Congress.

Sincerely,

Rosalind A Knapp (for)

Phillip D. Brady
General Counsel

Enclosures
- Letter to the President of the Senate
- Draft Bill
- Comparative Type
- Section-by-Section Analysis

ENCLOSURE (1)

THE SECRETARY OF TRANSPORTATION
WASHINGTON, D.C. 20590

The Honorable Dan Quayle
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

Enclosed for introduction and referral to the appropriate Committee is a draft bill

> To authorize employees within the Department of Transportation's Office of Inspector General who investigate violations of Federal criminal laws to exercise various law enforcement authority.

This proposal would authorize, pursuant to regulations issued by the Secretary of Transportation and approved by the Attorney General, the Department of Transportation (DOT) Office of Inspector General (OIG) criminal investigators to seek and execute search and arrest warrants, arrest a person without a warrant in emergency situations, and carry firearms. An investigator would be allowed to exercise such authority only while engaged in the performance of official duties within the scope of an investigation of violations of Federal criminal laws within the Inspector General's (IG) jurisdiction.

Under section 4(a)(1) of the Inspector General Act of 1978, as amended, the IG is responsible for conducting audits and investigations relating to DOT programs. The vast majority of these investigations are of alleged serious felonies including conspiracy; bribery; violations of antitrust laws, such as bid rigging in DOT funded construction projects; and making false statements and false claims to the Federal Government.

OIG investigators routinely encounter situations while investigating these crimes which call for the exercise of the law enforcement authority provided for in this legislation. For example, investigators must protect witnesses from threats; interview informants in dangerous, remote locations; and obtain evidence. Each of these activities requires exercising one or more of the law enforcement authorities granted by this proposal to ensure that the activity is done safely and effectively.

DOT OIG experience has shown that in over 62 percent of its investigations, either the agent has been deputized or the exercise of the law enforcement authority that would be provided in this proposal was needed. At any one time, an average of 50 percent of the DOT OIG investigators have been deputized, and this has been instrumental in the OIG's ability to respond to 273 serious situations where justification for full law enforcement authority was warranted. In addition, more than 30 percent of the National Crime Information Center checks which the DOT OIG has done show that the subject or witness has an arrest record, many for felonies and violent crimes, including assault on policemen and contract murders. Thus, this proposal's purpose is to provide the OIG investigators with the necessary tools to accomplish the IG's statutory mandate.

Currently, the law enforcement authority of the OIG investigators is very limited. While investigators may request the issuance of a search warrant pursuant to Department of Justice regulations, investigators are not authorized to execute the warrant. Similarly, investigators are permitted to carry firearms, but only when deputized by the U.S. Marshals Service and only for the particular investigation cited in the deputation. As a result, when the exercise of law enforcement authority is needed or anticipated, the investigator must first obtain the use of the services of other Federal law enforcement agencies, such as the Federal Bureau of Investigation.

These arrangements, however, have serious shortcomings. While other agencies generally agree to provide assistance, it often is delayed due to the other priorities of that agency. As a result, the investigation is delayed and can be seriously compromised when time is of the essence. In addition, OIG investigators are prevented from obtaining needed information from other law enforcement agencies when such agencies will only provide the information to other investigators with law enforcement authority. OIG investigators are often excluded from participating further in investigations that they have begun, since the assisting agency determines that, for example, to provide firearms protection for the OIG investigators as well as themselves is too burdensome and dangerous.

This proposal would not only avoid delays in the important work of investigating violations of Federal criminal laws in connection with DOT programs, but it would reduce certain duplicative government costs. Currently, the assisting agency often charges the OIG for expenses incurred in providing the law enforcement assistance. This can result in the payment by the OIG of duplicate expenses that not only drain OIG resources, but prevent the assisting agency from more effectively using its resources to accomplish its primary mission.

There are no personnel or budgetary increases associated with this proposal.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submittal of this legislative proposal to the Congress and that its enactment would be in accord with the program of the President.

Sincerely,

Samuel K. Skinner

Enclosures

A BILL

To authorize employees within the Department of Transportation's Office of Inspector General who investigate violations of Federal criminal laws to exercise various law enforcement authority.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, that chapter 3 of Title 49, United States Code, is amended by adding the following new section:

"Section 336. Law Enforcement Authority for Employees in the Office of Inspector General.

Employees in the Department of Transportation's Office of Inspector General who investigate violations of Federal criminal laws within the jurisdiction of the Inspector General and who are designated by the Inspector General, may, pursuant to regulations issued by the Secretary of Transportation and approved by the Attorney General,

(1) seek and execute an arrest or a search warrant, but limited to:

(A) arrests for offenses within the jurisdiction of the Inspector General;

(B) arrests for offenses involving resistance to the employee's authority; and

(C) searches and seizures of property related to such offenses;

(2) arrest a person without a warrant for a violation of Federal law related to the programs and operations of the Department of Transportation, if the employee has probable cause to believe that the person:

(A) is committing or has committed a felony; or

(B) is committing or has committed a felony or a misdemeanor the employee's presence; and

(3) carry firearms;

while such employees are engaged in the performance of official duties under the authority of the Inspector General Act of 1978, 5 U.S.C. app."

COMPARATIVE TYPE

(Deleted material is in brackets; new material is underlined)

TITLE 49, United States Code

Section 336. Law Enforcement Authority for Employees in the Office of Inspector General.

Employees in the Department of Transportation's Office of Inspector General who investigate violations of Federal criminal laws within the jurisdiction of the Inspector General and who are designated by the Inspector General, may, pursuant to regulations issued by the Secretary of Transportation and approved by the Attorney General,

(1) seek and execute an arrest or a search warrant, but limited to:

(A) arrests for offenses within the jurisdiction of the Inspector General;

(B) arrests for offenses involving resistance to the employee's authority; and

(C) searches and seizures of property related to such offenses;

(2) arrest a person without a warrant for a violation of Federal law related to the programs and operations of the Department of Transportation, if the employee has probable cause to believe that the person:

(A) is committing or has committed a felony; or

(B) is committing or has committed a felony or a misdemeanor in the employee's presence; and

(3) carry firearms;

while such employees are engaged in the performance of official duties under the authority of the Inspector General Act of 1978, 5 U.S.C. app.

ANALYSIS FOR LEGISLATIVE PROPOSAL TO PROVIDE OIG CRIMINAL INVESTIGATORS WITH LAW ENFORCEMENT AUTHORITY

BACKGROUND

The purpose of this bill is to authorize those employees within the Department of Transportation's (DOT) Office of Inspector General (OIG) who investigate violations of Federal criminal law to exercise various law enforcement authority when they are engaged in official duties under the Inspector General Act of 1978, as amended, 5 U.S.C. app. (IG Act). These employees are classified as criminal investigators, series 1811. Specifically, this bill would enable the criminal investigators to seek and execute a search or an arrest warrant in limited circumstances, execute arrests without warrants in limited circumstances, and carry firearms.

It is important to note at the outset of this discussion that this proposed legislation would in no way expand the OIG's jurisdiction. The proposal is limited to expanding the techniques, or tools, that the OIG's criminal investigators have available to enable them to conduct investigations related to the programs and operations of DOT. Section 9(a) of the IG Act precludes the IG from becoming involved in agency program responsibilities. Congress' purpose in including this limitation in the IG Act is to preserve IG independence. This proposed legislation does not alter this, but merely provides the IG criminal investigators with the tools they need to do their jobs more efficiently and effectively.

While the law enforcement authority of OIG criminal investigators is limited because Congress has not addressed the issue of full law enforcement authority with legislation, it has become clear in the more than 10 years' IG experience that such authority is required for the continuing success of IG operations. In over 62 percent of DOT OIG investigations, either the agent has been deputized or the exercise of the law enforcement authority that would be provided in this proposal was needed. At any one time, an average of 50 percent of the DOT OIG investigators have been deputized and this has been instrumental in the OIG 's ability to respond to 273 serious situations where justification for full law enforcement authority was warranted. In addition, more than 30 percent of the National Crime Information Center checks which the DOT OIG has done show that the subject or witness has an arrest record, many for felonies and violent crimes including assualt on policemen and contract murders.

Even when OIG criminal investigators are able to obtain some law enforcement authroity, it is limited. Investigators, for example, may request the issuance of a search warrant pursuant to authority granted by the Department of Justice (DOJ) in 28 CFR section 60.2(i). The investigators, however, are not authorized to execute the search warrant when issued. Similarly, the criminal investigators are permitted to carry firearms, but only when deputized by the U.S. Marshals Service (USMS) and only for the particular investigation cited in the deputation.

The range of the investigative work performed by the criminal investigators requires that the extent of their law enforcement authority be expanded to remove those limitations which hamper them from performing the essential aspects of their jobs. Under Section 4(a)(1) of the IG Act, the Inspector General (IG) is responsible for conducting audits and investigations relating to DOT programs. The vast majority of these investigations are of alleged serious felonies.

These investigations encompass a wide range of Federal criminal laws including conspiracy; bribery; theft of Government property; embezzlement; violations of antitrust laws, such as bid rigging in DOT funded construction projects; mail fraud; making false statements and false claims to the Federal Government; and perpetrating fraud in various DOT program areas. While civil penalties such as suspension and debarment may be imposed for violations of some of these laws, criminal sanctions are often the more effective and appropriate remedy. In Fiscal Year 1989, the investigations conducted by OIG investigators resulted in 119 indictments, 92 convictions, over $5 million in fines, 55 years in sentences, and 118 years probation.

Currently, when the exercise of law enforcement authority beyond existing authority is required or anticipated, OIG criminal investigators must first obtain the assistance of other law enforcement agencies within the Federal Government, such as the Federal Bureau of Investigation (FBI), the United States Secret Service, or the USMS, for assistance. These officials are able to enforce the search warrants that OIG investigators obtain and to make arrests as necessary.

These arrangements, however, have serious shortcomings. First, waiting for assistance from an authorized agent too often has a chilling effect on or compromises an investigation. For example, in one case, the criminal investigator had to wait several days for an FBI agent to execute a search warrant on a bank safe deposit box containing records previously withheld from the investigator. Fortunately, no evidence was removed or destroyed in the interval.

Second, the lack of law enforcement authority has prevented criminal investigators from participating fully in investigations that they have begun. Often when the assisting agency's investigators have been brought in to provide firearms protection for OIG investigators, the assisting agents have declined the OIG's further investigative assistance, since it presented them with the dual burden of protecting the OIG investigator, as well as themselves. In one investigation, an OIG criminal investigator, while conducting a joint investigation of a Coast Guard civilian employee for the alleged theft of Government property and trafficking in illegal explosives, was excluded by the second agency's investigators from the execution of a search warrant because they deemed it too great a burden to protect the OIG investigator as well as themselves.

Third, the lack of law enforcement authority has prevented OIG criminal investigators from obtaining necessary information from other investigative agencies. Recently, an investigator was following up on information that a DOT employee had been arrested for a narcotics violation. The cognizant police department declined release of the subject's arrest records to the investigator because its regulations defined a law enforcement officer as one who makes arrests and carries firearms.

Similar problems have occurred when an investigator has tried to obtain information from private national investigative services supported by the insurance industry. In one investigation, the organization did not recognize the OIG investigator as a law enforcement official since he did not have arrest authority. As a result, the organization would not release information relevant to allegations of fraud against the Government.

Fourth, in many instances the lack of full law enforcement authority has prevented OIG criminal investigators from continuing open criminal investigations. One Assistant U.S. Attorney (AUSA), upon learning that OIG criminal investigators were unable to provide protection for a grand jury witness whose life had been threatened, removed the investigators from the case in favor of the FBI whose agents have full law enforcement authority. In this connection, many AUSAs have strongly expressed their desire that OIG criminal investigators acquire full law enforcement authority, reasoning that this would eliminate duplicate second agency effort and resources and effect more timely results.

In addition, as stated above, the AUSAs and investigators have had to delay criminal investigations in order to request and receive deputation by the USMS. This arrangement, however, has additional liabilities. For example, upon deputation, the agent's ability to exercise law enforcement authority is limited to a particular investigation. Thus when another criminal investigation warrants it, the investigator must repeat the process to be redeputized. Furthermore, the approval process for this can be complicated and lengthy. A delay of up to 6 months in a situation requiring a fast response has not been unusual.

Avoiding such delays is one of the many advantages that would result from providing full law enforcement authority for OIG investigators. In addition, the ability to exercise full law enforcement authority will enhance investigators' ability to carry out the IG's statutory responsibility to investigate violations of laws in connection with DOT programs. Furthermore, the granting of this authority will enable the OIG to attract more and better qualified candidates for its investigative positions. In one OIG regional office alone, four well-qualified investigators cited the lack of law enforcement authority as a primary reason for leaving. Each investigator joined another agency having greater law enforcement authority than the DOT OIG.

Moreover, providing criminal investigators full law enforcement authority will reduce certain duplicative Government costs. As stated above, the investigators' lack of authority often requires the services of a second Federal agency, some of which have charged the OIG for associated costs. For example, the OIG was required to pay a law enforcement agency for protection during a consensual monitoring to record payoff attempts by student pilots to a Federal Aviation Administration certifying official who then allegedly falsely certified that the students had passed their flight tests. In another case, the OIG routinely paid another agency to execute OIG obtained search warrants. The costs of unnecessary duplicate salaries plus benefits can become significant and not only drain OIG resources, but also prevent other agencies from more effectively committing their resources.

There could be disadvantages in providing additional law enforcement authority to OIG investigators. One could argue that there is a risk that the activities of the investigators could interfere with the work of other law enforcement agencies, such as the FBI. This risk is minimal, however, since the standard operating procedure for DOT OIG investigators is to contact other appropriate agencies whenever the subject or alleged crime under investigation would be of interest to them. Moreover, the additional authority provided by this bill would enlarge the cooperation between agencies, since it would reduce the number of OIG assistance requests, which compete with the other agency's own investigations and limited resources.

It is also arguable that the provision of this authority will increase the risk of tort liability and Bivens actions against the Federal Government and the criminal investigators. While it is not possible to predict if this will occur, the DOT OIG has not experienced such problems and over 50 percent of the DOT OIG investigators are or have been deputized. The requirements of adequate and continuing training and regulations approved by the Attorney General should contribute to minimizing any problems.

In addition, there could be a concern that granting full law enforcement authority would serve to deemphasize investigations that are unlikely to lead to criminal penalties. The authority that would be granted under this bill, however, will not have this result. The purpose of this bill is to provide investigators with the necessary tools to perform their jobs. It will in no way restructure the IG's investigative program or diminish the active and aggressive investigations of all violations of laws in connection with DOT programs.

The Department has reviewed this proposal in relation to DOJ "Guidelines for Legislation Involving Federal Criminal Law Enforcement Authority," June 29, 1984, and finds that it is in substantial compliance with these guidelines, since, among other things, it recognizes the need to address the issue of expanded law enforcement authority on a agency-by-agency basis.

SECTION-BY-SECTION ANALYSIS

This bill will provide law enforcement authority to the criminal investigators within the DOT OIG. The limitations that the bill places on this authority will be discussed later.

Paragraph (1) would enable investigators to seek and execute a search or arrest warrant. However, the bill places three limitations on this authority. Subparagraph (A) states that the offenses for which the investigator is authorized to make arrests must be within the jurisdiction of the DOT IG. While the range of such crimes is wide, it is limited to offenses performed in connection with DOT programs. For example, DOT OIG investigators would not be authorized by this provision to seek or execute a search or an arrest warrant for the alleged theft of Government property in connection with another agency's program, e.g., the U.S. Department of Agriculture's (USDA) food stamp program. That particular program is within the jurisdiction of USDA and, therefore, outside the limited jurisdiction of the OIG in terms of this bill.

This limitation, however, is not to be read to only permit the investigators to exercise law enforcement authority if the criminal statute is contained in the various DOT implementing statutes. The language "within the jurisdiction of the Inspector General" is broader. For example, OIG criminal investigators investigate violations of fraud in various DOT programs. While the criminal sanctions for such fraud may be contained in DOT statutes, prosecutions for violations are often brought under the U.S. Postal Service's mail fraud statute, 18 U.S.C. 1341. Even though mail fraud is not a part of the DOT legislation, it is a statute within the jurisdiction of the IG and, thus, an OIG investigator could exercise law enforcement authority while investigating mail fraud in connection with one of DOT's programs.

Subparagraph (B) would permit an investigator to seek and execute an arrest warrant for offenses involving resistance to the investigator's authority. For example, it would permit an investigator to arrest an individual who was assaulting the investigator to prevent the investigator from executing a search warrant.

Subparagraph (C) would limit the property for which an investigator could seek and execute a search warrant to property related to either of the two types of offenses listed in subparagraphs (A) and (B). Thus, an investigator could seek and execute a search warrant to obtain alleged counterfeit spare parts in relation to a Coast Guard investigation, but not for medical equipment stolen from a Department of Veterans Affairs hospital.

Although section 6(a)(4) of the IG Act authorizes the IG to issue subpoenas, it is a limited authority. The statute states that the IG may require the production by subpoena of "all information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence." Thus, the IG's subpoena power is basically limited to obtaining documentary-type evidence. Without the additional authority to seek and execute search warrants to obtain other types of physical evidence, the investigation is compromised, since the investigator is prevented from gathering evidence necessary to make a successful prosecution case.

The DOT OIG investigators are often placed in situations where the need to seek and execute search warrants is concurrent with making an arrest. For example, an investigator was investigating the Coast Guard's receipt of fraudulent vouchers. The AUSA directed the investigator to arrest the subject. However, upon learning of the investigator's lack of authority to do so, the AUSA had to request the assistance of a second law enforcement agency at additional cost and time to the investigation. Similarly, another AUSA directed the investigator to arrest a subject to prevent him from fleeing. The individual was a foreign national with a history of fleeing the United States to avoid arrest. Due to the investigator's lack of authority, the subject successfully fled the country.

Search warrants are often needed during the course of an investigation. As discussed above, agents have been required to physically recover stolen Government property from subjects and to obtain documents from their safe deposit boxes. While the investigator is authorized by law to seek the search warrant, the inability to execute it delays and, at times, jeopardizes investigations.

Paragraph (2) authorizes OIG investigators to execute arrests without a warrant if the investigator has probable cause to believe that a person, under subparagraph (A), is committing or has committed a felony, or, under subparagraph (B), is committing or has committed a felony or a misdemeanor in the investigator's presence. The purpose of this provision is to enable an investigator to respond to rare, but significant, emergency situations when an arrest is required immediately and there is no time to seek and obtain an arrest warrant.

This provision is broader than paragraph (1) because the offense for which the investigator is making an arrest may fall beyond the DOT OIG's jurisdiction. The offense must, nonetheless, be of Federal law, and thus, this provision would not provide investigators with common law arrest authority, since such authority would permit an investigator to make arrests for violations of any offense, including state offenses, not just Federal offenses. In addition, the offense must be committed in relation to the programs and operations of DOT and would not authorize an investigator to arrest a person for the witnessed theft of Federal property from a national park.

OIG investigators do encounter emergency situations requiring immediate arrest in carrying out their duties. Recently, an investigator was involved in a major grand jury investigation. One of his duties included acting as the bailiff at the grand jury. An individual attempted to breach the privacy of the grand jury but was properly denied access by the investigator. In order to gain illegal entry into the grand jury proceedings, the individual began to push and shove the investigator who would have arrested the person if he had had the authority to do so.

In addition, many of the crimes that the OIG agents investigate are particularly susceptible to being witnessed by the investigator. These include the theft of Federal property, bribing Federal officials, and the sale of drugs in DOT buildings. If an investigator were able to arrest the perpetrator immediately, it would make apprehension more efficient and effective.

Paragraph (3) of the bill would permit investigators to carry firearms. In connection with their responsibilities to investigate violations of criminal laws relating to DOT programs, the investigators must perform undercover work; conduct covert surveillances; develop and use informants; make arrests, interview, interrogate and protect witnesses, serve subpoenas, and conduct searches and seizures. These activities often place investigators in hazardous situations in which firearms authority is required. In one case alone, an investigator had to serve 180 subpoenas and encountered hostile recipients, guard dogs, snakes, and even a lynx.

In another investigation, a witness to an alleged bid rigging in a highway construction project requested witness protection because of repeated threats from other contractors who had told the witness not to "rat on them." Allegedly, several contractors had attempted to force the witness' vehicle from the road. Since the OIG criminal investigator lacked the authority to carry a firearm to protect the witness, the witness remained unprotected until it was provided by the cognizant state attorney general's office. Similar witness protection situations have occurred for both grand jury witnesses and for those individuals who have agreed to participate in consensual monitorings of suspected bribers. However, the investigator's lack of ability to provide witness protection has jeopardized investigations and resulted in premature termination of criminal cases.

Criminal investigators are often placed in dangerous surroundings while attempting to interview witnesses, many of whom are both recidivists and allegedly connected to organized crime. The inability to carry a firearm leaves the agent vulnerable to serious injury and death. In one bid rigging case, a potential target contractor insisted upon being interviewed in an isolated, rural area. When the investigator finally faced the contractor, the contractor was armed. A similar situation occurred during the investigation of alleged payoffs to public officials. Although the informant agreed to an interview, the investigator was forced to follow him into an isolated area, where he displayed a weapon to the investigator. Recent investigations have taken agents into rural areas of California where illegal marijuana crops have been discovered, protected by booby traps and armed guards. In addition, investigators have been fortuitously warned just prior to accidentally entering onto land where violent, antigovernment sects reside. Thus, while attempting to carry out their legitimate DOT functions, OIG criminal investigators have been placed in dangerous, life-threatening situations without the ability to provide basic self-protection with firearms.

In the situations in which the OIG investigator would exercise the law enforcement authority granted by this bill, it is unlikely that he or she could rely instead on other law enforcement agencies to exercise that same authority. One means for obtaining this assistance would be through the execution of a memorandum of understanding (MOU). In 1982, the DOT OIG and the FBI entered into an MOU which sets forth, relative to the investigations of alleged violations of Federal criminal laws, the primary roles of each organization. As discussed above, it is clear that many situations requiring the exercise of law enforcement authority are often unexpected, and the constraints prohibit an investigator from planning ahead to enlist the assistance of other agencies or requesting and receiving deputation by the USMS. While other agencies try to be responsive when asked, the very nature of the unanticipated need makes prearranged help infeasible. In addition, many other agencies have their own budget constraints and other priorities, including those set by an AUSA, to contend with and thus are ill-equipped to assist when needed. Moreover, it is anticipated that providing law enforcement authority for the OIG investigators will, in fact, enhance cooperation between agencies, since it will reduce the number of OIG assistance requests and reduce the drain on the other agencies' resources.

One important concern in the exercising of law enforcement authority is to ensure that only persons who have been appropriately trained and who are adequately supervised will receive this authority. This bill seeks to ensure that such training and supervision will occur in several ways. First, the bill states that any law enforcement authority will only be exercised by investigators designated by the IG as able to exercise the authority.

Second, the exercise of any law enforcement authority under this bill must be in conformance with regulations issued by the Secretary of Transportation. It is intended that the regulations specify the criteria that the IG must use in deciding whether to designate a particular investigator as able to exercise the law enforcement authority granted by this bill.

Among the criteria, however, will be the requirement that an investigator successfully complete specified training courses, such as those provided by the Federal Law Enforcement Training Center in Glynco, Georgia, before qualifying for designation. It is important to note that all Federal investigators, except those at the FBI and the Drug Enforcement Administration which provide their own training courses, now must pass the basic training course at Glynco. DOJ recognizes this intensive training requirement as a sufficient basis for qualifying DOT OIG investigators for deputation. DOJ has never turned down a DOT OIG request for deputation based on a lack of training or proficiencey.

In addition, the criteria will include periodic refresher courses, retesting, and reevaluation. This will ensure that the investigator continues to be proficient in the total use of authority while continuing to possess the ability to exercise sound discretion in carrying out these duties.

The bill states that any regulations that the Secretary issues pursuant to the authority granted by this bill would have to be reviewed and approved by the Attorney General. DOT recognizes that the Attorney General has the responsibility within the executive branch to ensure that any and all law enforcement authority exercised by executive branch employees is granted cautiously, monitored carefully, and exercised responsibly. Requiring the Attorney General's approval of these regulations will ensure this as well as preserve and protect the individual liberties of America's citizens.

To the extent that the regulations permit, the IG could issue policies and procedures on the exercising of the law enforcement authority granted by this bill. The IG would include such policies and procedures in its Operating Procedures Manual (OPM). It is DOT's intent that any such additions to the OPM would also require review and approval by the Attorney General.

Third, the bill further limits the exercise of these powers to when the investigator is engaged in the performance of official duties under the authority of the IG Act. Unofficial exercise of any authority is not authorized by this bill. This is critical to the responsible exercising of this authority. OIG criminal investigators are certainly responsible for investigating criminal actions, but that responsibility is limited to their functioning within the scope of their jobs.

Department of Transportation
Office of Inspector General
(DOT-OIG)

DISCUSSION AND RESPONSE TO SENATE GOVERNMENTAL AFFAIRS COMMITTEE QUESTIONS CONCERNING FULL LAW ENFORCEMENT AUTHORITY FOR INSPECTOR GENERAL CRIMINAL INVESTIGATORS

Question A. Does your agency's governing statute permit IG personnel to carry weapons? If the answer is yes, please specify and attach a copy of the statute, agency directive or other description of the authority.

Answer: As you know, the Inspector General Act of 1978 (IG Act), and as amended, does not provide this authority. We have researched this question extensively in the past and have found no other authority within the Department of Transportation (DOT) that would allow or permit our agents to carry weapons in the performance of the IG mission.

Question B. If your answer to question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?

Answer: Notwithstanding this particular lack of authority, our investigations staff has encountered increasingly frequent instances which have required exercise of full law enforcement authority, including carrying weapons. In the pursuit of specific criminal investigation cases or projects, our special agents have been authorized to carry weapons and exercise law enforcement authority on the basis of prior appointment as Special Deputy U.S. Marshals. To meet specific case requirements, approximately 50 percent of our investigative force are deputized by the U.S. Marshal's Service at any one time.

A predominate requirement in applying for special deputation is the agency's certification of each and every special agent's weapons training and qualification. Since all deputation requests are forwarded to the Department of Justice for review and approval prior to actual appointment, these qualifications are scrutinized to ensure that all law enforcement standards have been met.

ENCLOSURE (2)

All DOT-OIG special agents have received accredited law enforcement training at a recognized Federal law enforcement training facility. The majority have completed the Federal Law Enforcement Training Center (FLETC) program at Glynco, Georgia. FLETC is an accredited institution administered by the Department of the Treasury and provides nearly all law enforcement training for Federal agents and officers assigned to agencies outside the Department of Justice. The remaining few receive similar training at other Federal law enforcement schools or facilities. An integral part of all of these programs is training and instruction in firearms use, law, and safety. Accordingly, before any DOT-OIG agent is assigned to a criminal investigation, whether or not that assignment requires the exercise of full law enforcement authority, that agent has received institutional training in firearms use, authorities, and laws as well as instruction in DOT-OIG's specific policy and procedures.

The DOT-OIG Operating Procedures Manual clearly defines the limitations of firearms availability to and use by our agents. Firearms may only be employed by deputized personnel while pursuing specified cases or investigations. This includes executive protection assignments, for which deputation is also a prerequisite. Further, carrying of assigned weapons by a deputized agent must first be reviewed and approved by that individual's supervisor. Generally speaking, weapons may not be carried while in an off-duty status, except when special circumstances arise.

We believe that firearm authority is essential to the criminal investigative mission of our organization. In our investigative projects and assignments, we are continually confronted with the need to exercise some element of full law enforcement authority, such as executing search warrants, executing arrest warrants, conducting consensual monitorings, and other similar law enforcement duties. Our criminal investigation assignments require our special agents, or some other duly empowered Federal law enforcement officers, to conduct case related assignments which entail some element of personal risk to a witness, to the agent, or to a third party involved in the investigation.

Question C. If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where Inspector General personnel may have been unnecessarily placed in danger as a result.

Answer: As previously described, there have been many instances where the lack of full law enforcement authority has had a negative impact on the ability of DOT-OIG special agents to successfully meet their investigative objectives. Although carriage and use of firearms is one of the specific authorities we need, it is by no means the only one. Authority to carry firearms would be a strong supportive factor, however, in the successful execution of all law enforcement authorities which we are actively seeking.

As mentioned in our transmittal letter, the DOT has forwarded a legislative proposal to the Office of Management and Budget that would grant full law enforcement authority to DOT-OIG criminal investigators. Included with the proposal is supporting information that answers each prerequisite for these authorities as expressed by the Attorney General in his policy statement of 1984.

Without firearms authority, we cannot execute actions such as the service and return of search warrants, which are required in our investigations. Clearly, this type of an action could reasonably place an agent in personal jeopardy without the necessary means of protection or defense. Similarly, any kind of mission-essential action involving cooperating witnesses, such as when a witness has agreed to wear concealed electronic equipment into a meeting with a case target or hostile party, is inhibited and proscribed without our being able to provide protection or defend the witness should such be needed. This requirement to provide for situational security of others is an essential component of our request for full law enforcement authority.

Criminal investigations, by their very nature, often concern people involved in illegal or unauthorized acts. Resolving these acts through investigation and prosecution often entails conflicts between the investigative targets and the Government agents. While the Government has provided its agents with the devices to investigate these crimes, it has not always provided the authorities necessary to use those devices. For example, IG agents are authorized to swear to the facts and circumstances in an affidavit for a search warrant, yet those same agents cannot serve the search warrant because they have no means of overriding the physical and property risks involved. The same situation exists where an IG agent can swear to the issuance of an arrest warrant pursuant to an assigned investigation, but cannot make the arrest. Resolving these problems through other means, such as enlisting outside assistance, often causes critical delays between the issuance of a warrant and its actual service.

DOT-OIG agents have also experienced situations in the course of their investigative assignments where weapons have been displayed and threats expressed or perceived. We have often had interview situations where the interviewee was armed and our personnel were not. On a highway bid rigging investigation, a DOT-OIG interviewed a potential target in an isolated, rural setting. The individual was armed with a hunting rifle in the rack of his vehicle. On another case, our special agent interviewed a witness in a rural setting who displayed a handgun in his briefcase to the agent. We had another instance where our agent, in the company of a Federal Bureau of Investigation (FBI) agent, entered a witness' home to interview the individual and observed a semiautomatic rifle and a shotgun lying on a table within reach of the witness. The agents quickly unloaded the two weapons, conducted the interview, and left. Afterward, the FBI agent expressed concern over our agent's inability to provide assistance should it have been required. He was further concerned about future working relations with IG agents, because he felt that IG agents were an operational liability in such circumstances.

There have also been instances where our agents were verbally threatened but not assaulted. Two DOT-OIG agents attempted to serve a subpoena on an investigative target living in a highrise apartment building. The target began screaming obscenities at the agents, grabbed the subpoena, tore it to pieces, and began jumping up and down on the shreds. When the person made threatening gestures at our agents, they retreated. On another occasion, an agent went to a corporate officer's home to serve a subpoena because the individual had evaded service during office hours. Upon receiving the subpoena, the corporate officer began screaming at our agent and ordered the investigator off his property. Since the individual also had a large dog at his side which was growing agitated, the agent left immediately.

During another investigation DOT-OIG agents attempted to obtain handwriting exemplars from a target. During attempted service of a grand jury subpoena to obtain the exemplars, the IG agents were threatened with physical violence by the target's family members. The agents later enlisted the aid of a deputy sheriff, who advised the agents against going near the target's home unless armed or escorted, because the individual had been previously convicted of assault. On another case, DOT-OIG agents were proceeding with investigation of stolen Government property at the time a second law enforcement agency was investigating the same target for Federal weapons violations. Our agents were present at the target's residence when the second agency's representatives served a search warrant. During their search of the premises, the agents found machine guns and hand grenades as well as some of the stolen property relative to our investigation.

DOT-OIG has been conducting an extensive nationwide investigation into aviators' failure to disclose drug and alcohol convictions to the Federal Aviation Administration (FAA) when applying for airman certificates. A computer match comparing FAA records against law enforcement files identified over 6,000 pilots who met the initial match parameters. The match also revealed that thousands of those same pilots had other felony convictions ranging from simple assaults to drug smuggling and murder. Many had served time in prison and were on parole. In preparing for further investigation, we requested U.S. Marshal special deputations for each assigned case agent. While most of the agents were accordingly deputized, some of our requests for deputation were denied. We believe that the extent and degree of the target population's established felony history, much of which entails violent criminal acts, poses a serious risk to our personnel without full law enforcement authority and means of protection.

During the course of our investigations, we make criminal history records inquiries on investigative targets and on many of the witnesses we intend to interview. We frequently find that these people have criminal records of which we were not previously aware. In a recent 2-year period, our checks on prospective targets or witnesses resulted in 1,500 reports of prior felonies. Of these, 65 entailed more violent crimes, such as first degree murder, contracts to commit murder, and assaults on policemen. There have been a few situations where we have decided against interviewing a witness due to the individual's criminal history.

Working without firearms authority has had an impact on the mission of the IG. It has inhibited our special agents in the performance of many of the tasks which IG investigators are normally expected to perform. The lack of this authority has required us to search out other law enforcement agencies' assistance on cases, which has delayed action on some of our cases. It has resulted in a lack of confidence in our personnel by fully empowered special agents in other agencies and a reluctance on their behalf to work with us in certain instances. It has also impeded our ability to receive information from other state and local law enforcement agencies who have advised our people that they are not considered law enforcement agents, since they lack the power to make arrests and to carry weapons. It has adversely affected our working relationships with certain U.S. attorneys offices once they have learned that our agents cannot provide protection to witnesses, serve search warrants, make arrests, or operate in high-risk environments without police escort. On a few occasions, U.S. attorneys have reassigned matters normally within the jurisdiction of the DOT-OIG because our agents have lacked full law enforcement authorities. Finally, it has resulted in circumstances where our agents have been placed in or have found themselves in dangerous or risky situations without a means of protection. It should be stressed, however, that firearms authority by itself would be insufficient and impractical without the full range of authorities to serve warrants and make arrests.

Question D. What additional training and expenses would be included if firearms authority was provided to inspector general personnel?

Answer: No additional costs would be incurred by the investment of this authority for DOT-OIG personnel. As previously stated, all of our criminal investigators have received weapons training as part of their accredited law enforcement training. New personnel will continue to complete the FLETC program, which includes weapons training. Costs for this training are already included in the DOT OIG budget.

We also anticipate no additional costs for special equipment associated with the legislative proposal. Because so many of our agents have been deputized, we have already acquired weapons at no cost from other Federal law enforcement agencies that were replacing weapons or disposing of excess inventory.

Question E. What limitations would you place on such powers if granted? (For example, should wearing a weapon be limited to those instances when danger is expected?)

Answer: DOT-OIG directives limit the use of weapons to official duty, and we do not believe that this policy should be changed. There are instances where our agents and their supervisors know in advance that a weapon will be required in conjunction with an investigative assignment. On those occasions, the weapons would be assigned to the case agents by the office supervisor for the specific mission. However, under circumstances such as extended travel to case worksites, it is not always possible to foresee a specific requirement for a weapon or the possibility of danger. In these instances, we expect that our agents would be assigned a weapon in advance by their supervisor. We already have in place the necessary governing policies and equipment to allow travel by commercial air with duty weapons. Since many of our agents are deputized and therefore have the authority to travel to worksites with their weapons, we have acquired portable security containers for those weapons.

Question F. It has been suggested that deputation as Assistant U.S. Marshals may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation. You may wish to consider the following issues:

1. What is the procedure for obtaining authorization for appointment as a Special Deputy U.S. Marshal for your personnel? Which officials within your agency or the Department of Justice must approve such deputations?

Answer: The established procedure for obtaining Special Deputy U.S. Marshal authority for our agents is a cumbersome and time consuming process, which is frequently not timely enough to address the needs of the investigation. The procedure begins with an evaluation of the requirements by the case agent and immediate supervisor, sometimes in concert with an assistant U.S. attorney or personnel from another law enforcement agency. The agent and his or her supervisor then fully coordinate the particular investigation with the cognizant U.S. attorney's office and receive the approval to request special deputation. The agent's supervisor then transmits a request and justification through the DOT Assistant Inspector General for Investigations for approval and release to the Assistant Attorney General, Criminal Division, Department of Justice. The actual processing is handled by the Office of Enforcement Operations, Criminal Division.

Once the request is in the hands of the Department of Justice for review and approval, we are less certain of the process, as it has been revised a number of times in the recent past. Unfortunately, these operational revisions within Justice may have contributed to some untimely delays in the review process. At some point, the request is reviewed by a Justice Department attorney, who contacts the appropriate U.S. attorney for confirmation of his or her approval. If the reviewing attorney concurs with the need for deputation and approves the request, it is sent to the Deputy Attorney General for final approval. Once this is granted, the request is transmitted to U.S. Marshals Service headquarters offices.

At this point, the U.S. Marshals Service is responsible for acting on the approved request. If the required training, experience, and recency of firearms qualifications standards are satisfied, a message is sent to the appropriate U.S. Marshals Service field office authorizing deputation for the particular DOT-OIG agents. The Marshals Service then notifies those IG agents and arranges for them to be sworn in as Special Deputies by the appropriate local U.S. Marshal.

2. On average, how long does the process for reviewing requests for these appointments take?

Answer: This process described above can take an unwarranted amount of time, especially within the Department of Justice.

Over the past year, these requests have taken an average of over 3 months for approval. Some requests have taken as little as 1 week, while others have taken as long as 8 months. One of our requests had been either lost or misdirected within the Justice Department and was pending approval for 14 months until we were finally advised to resubmit our request. In an effort to alleviate these problems, DOT-OIG investigative managers met with senior Department of Justice officials to identify means of expediting the process and to ensure that we were properly meeting their requirements. Justice then advised us that the review and approval process had been changed to afford a more timely response; however, even after this coordination, it continues to take 3 months or longer for our requests to receive final approval.

We understand that Department of Justice attorneys who review these deputation requests are also tasked with many higher priority assignments and that they must address deputation matters only as time allows. We remain concerned, however, with the negative impact that this cumbersome process and delays have on the progress of our criminal investigations.

3. How many requests for deputation have you sent to the Department of Justice during the last year? How many have been denied? For what reasons?

Answer: Over the past year, we have submitted 25 requests for deputation to the Department of Justice, where 5 have been denied. The reasons for nearly every denial were that the lengthy review process had been overtaken by the events of our investigation. Due to the delay in acquiring special deputation authority in these instances, DOT-OIG managers were forced to obtain alternative means of providing special agent protection, usually in the form of assistance from fully empowered law enforcement agencies. As detailed in number 6 below, this too has its drawbacks. The five denials all related to the airmen investigations discussed previously, wherein many of the identified targets not only falsified their certification applications regarding drug and alcohol convictions, but also had felony records involving violent crime. Some of these denials involved reauthorization requests for agents on the same investigations that had been previously approved, and the denials were issued by the same Justice Department reviewer that had granted the initial approval.

4. Is there any avenue for reconsideration of denial of a request for deputation?

Answer: Following some denials, the DOT-OIG Assistant Inspector General for Investigations determined that the circumstances surrounding the particular investigations still warranted deputation. He met with appropriate senior Department of Justice officials and obtained an agreement to review the requests and denials. In some cases, but not all, these measures were successful, and deputation authority was eventually granted.

5. I have been informed that "blanket authorization" was granted to criminal investigators of the Department of Interior for purposes of investigation of Bureau of Indian Affairs matters. Under what circumstances are such "blanket" approval granted? How many have been requested and how many have been granted since January 1, 1990?

Answer: DOT-OIG has never applied for nor been granted blanket authorization for deputation of its special agents. We are not aware of the circumstances under which such authorizations are granted. While blanket deputation authority would be a welcome temporary remedy, we do not believe that it would provide a permanent solution to the lack of full law enforcement authority for IG criminal investigators.

One of the enduring problems with Special Deputy appointments is that they are case specific. For example, an agent who is deputized for a case involving contract fraud on a U.S. Coast Guard procurement cannot extend and apply this authority should the need arise in an extortion scheme related to FAA operations. This preclusion exists even though the agent may be the only DOT-OIG investigator in a given area or available for assignment to the second case. While blanket authority may be useful for agencies with fewer or more narrowly defined programs than exist in this Department, we do not believe that blanket deputations would be granted to cover the wide array of DOT programs and operations. The Department encompasses 10 Administrations, and our investigative caseload covers many of these Administrations at any one time. In addition, our investigative program includes contract and procurement cases, grant investigations, matters concerning public safety, and numerous employee investigations throughout the Department. Blanket deputation authority would be needed to cover all of the investigative responsibilities we assume.

6. Are requests that agents be deputized ever denied by the Department of Justice even though they have been requested by the pertinent United States Attorney's Office? For what reason would the Department of Justice override the recommendation of a United States Attorney's Office?

Answer: There have been some instances where the Justice Department has decided that too much time has elapsed since we first submitted a particular request for deputation, and we were asked for more information or resubmission of the request. On one occasion, we requested deputation for 11 special agents assigned to the above-mentioned airmen investigation over an entire Federal region. After some time, the Justice requested additional information and redefinition of the level of threat facing the agents. Another similar request was under consideration for such a long period that the matter was considered "stale," and we were asked to resubmit our request. As discussed previously, to ensure timely progress of the investigation, we sought alternative means of protecting the agents. We consequently notified the Justice Department that we were withdrawing these particular requests for reasons of timeliness. Nonetheless, Justice continued its process and issued denials of these same requests.

This delay in approving and granting Special Deputy authority is a commonly recurring problem. DOT-OIG's need for fully empowered agents is often very time sensitive, and delays in the deputation approval process can result in a degradation of the investigation unless there can be found a way of resolving the problem.

We were informed during one meeting with Criminal Division officials that they had been advised by the Deputy Attorney General's office to "tighten up" on the issuance of approvals for deputation requests. We were also advised that they would be examining each request in light of a Department of Justice, Office of Legal Counsel, opinion that had been issued regarding general IG investigative authority (the "Kmiec memorandum").

7. How long does a Marshal's appointment last? What is the procedure for renewal of a deputation? How long does this process take?

Answer: Each appointment is applicable to a specific case, and none can exceed 1 year. All appointments expire on June 30 of each year. Thus a deputy appointment that was accorded on July 1 will be in effect for 1 year, but another that was effected in March of a given year will last only for some 4 months. Each appointment must then be renewed each July 1, if DOT-OIG still finds it necessary for the specific investigation.

The procedure for renewal, and the length of time from application to approval, is virtually the same as it is for the initial application.

Comments Regarding the Deputation Process

We have attached a table of the deputation authorities we have requested since late 1986, which reflects the amount of elapsed time between application and approval.

The Special Deputy authority system has been both a blessing and a problem for us. We have had the good fortune of receiving deputations for many of our agents when the lack of such authority clearly would have impeded our ability to accomplish our mission. It has provided us with the means to conduct and/or contribute to many criminal investigations we could not otherwise have accomplished. At the same time, the awkwardness of the application procedure and the slow pace of the review process is frustrating and in some instances has held an important investigation in abeyance for a long time. For example, the 14-month delay we cited earlier, and the necessity to resubmit our request when the initial application could not be located, proved very costly to the progress of our pilot investigation in the western United States.

It is also a detriment to our mission when agents already deputized cannot use that authority on another investigation and must submit a new request for a second deputation. We have found that the amount of time needed to gain approval of the second request remains unaltered.

These problems are the basis for our seeking statutory empowerment of full law enforcement authority for DOT-OIG criminal investigators.

The following are our responses to the three additional questions presented in your letter:

Question: I am concerned about reports that audit and investigations are also impeded by the perceived or actual lack of authority to execute judicially approved search and arrest warrants. Should this power be given to Inspector General personnel?

Answer: As discussed in our response to previous questions, IG investigators are not empowered to execute judicially approved search or arrest warrants. This is by no means a perceived lack of authority. IG agents who are not appointed as Special Deputy U.S. Marshals have no additional powers beyond those of a normal citizen. We do not anticipate any need for such authority for IG audit personnel, as serving and executing search and arrest warrants are not a part of their normal mission or responsibilities.

Question: I would appreciate receiving a complete description of the protective services, if any, furnished by IG personnel for the head of your agency during the past 5 years, including some estimate of the personnel years expended for this purpose, and the authority for providing such services.

Answer: DOT-OIG personnel do not regularly or routinely provide protective services for the Secretary of Transportation. The Department's Office of Security has primary responsibility for such service. Since the security staff is relatively small and the IG has a number of criminal investigators with both the training and experience to perform protective service functions, a limited number of DOT-OIG Headquarters investigators are empowered to provide backup support as needed. To date, we have been called upon for assistance fewer than a half-dozen times. We do not view this as an integral part of the IG mission, nor do we anticipate providing more than occasional backup support in the future.

Question: The Committee has heard testimony from a number of Inspectors General concerning the limitations the Justice Department has sought to impose on IG audit and investigative activities in two memorandums issued by the Office of Legal Counsel (particularly "Kmiec I" dated March 9, 1989). Please provide the Committee with any comments you may have on the impact of these memorandums on your ability to complete your mission.

Answer: The President's Council on Integrity and Efficiency has made the March 9, 1989, memorandum ("Kmiec" memorandum) available to the entire IG community for information. The issue fostered by the Kmiec memorandum is the investigative authorities vested with the IGs. The memorandum imposed a very strict reading of the investigative authority of the Department of Labor IG, based on a jurisdictional dispute between the Solicitor General and the Labor IG. The Office of Legal Counsel (OLC) arbitrated the dispute and ruled, via the Kmiec memorandum, that the IG Act restricted the IGs' investigative authority to only those matters which directly involved departmental personnel or departmental funds. The memorandum specifically precluded IGs from conducting what was identified as regulatory investigations, an issue which was at the heart of the dispute at the Labor Department.

Since then, the DOT-OIG has corresponded directly with the OLC, at that office's invitation, requesting a review of the general investigative authority vested with DOT-OIG. We received OLC's opinion by letter dated December 1, 1989. It stated that the investigative authorities that were transferred to and assumed by the DOT IG under the provisions of the IG Act were properly within its jurisdiction. OLC specified that DOT-OIG has the same broad authorities to investigate matters pertaining to DOT programs and operations that were held by the various DOT investigative units which existed prior to implementation of the IG Act.

It would not appear that any of the correspondence or dialogue exchanged between the various IGs and OLC precipitated a question of the audit authority vested with the IGs.

While we believe that the OLC reaffirmed the broad investigative authorities held by DOT-OIG, we are concerned that questions about specific investigative authorities remain unresolved. The major contention about what constitutes regulatory responsibilities raised by the Kmiec memorandum still lingers. Although we believe that OLC was correct in reaffirming the independence of the IG and its need for an unencumbered oversight role, we also believe that an overly broad interpretation of this preclusion was rendered by the OLC. We do not advocate an IG role in the regulatory enforcement mechanisms of DOT. What we do advocate, however, is an affirmation of the IG's right to conduct criminal investigations into illegal acts committed by individuals or corporations pursuant to Departmental regulatory mechanisms. This investigative authority would in no way interfere with or displace the existing Departmental programs of regulatory enforcement. We have always asserted a difference between regulatory enforcement proceedings and law enforcement proceedings. We do not want to see a diminuation of the IG's role to conduct investigations into criminal acts committed pursuant to regulatory program matters within the Department's purview.

For this reason, we believe that the committee should amend the IG Act to clearly authorize the IGs to conduct such investigations. Without resolution of the investigative authority question, IG investigators will become routinely challenged for jurisdiction by all manner of investigative targets, attorneys, and program officials. As an example, we have an investigation dealing with an individual who falsified a DOT certification and then used the false certification to support an application for certain authority from another agency. The assistant U.S. attorney assigned to prosecute the case spent a great deal of time researching our authority to conduct this investigation. There followed a lengthy dialogue on the issue between the assistant U.S. attorney and the OLC, which eventually decided that DOT-OIG in fact had the authority to conduct this investigation. We believe that legislative action should be taken to clarify the IG authority and preclude the necessity for OLC to act as a referee on a case-by-case basis.

ATTACHMENT:

Table of Special Deputy appointments requested by DOT-OIG for the period September 1986 to present.

Deputation Processing-Approval Time: March 1990

	Date of Application Initial/Extension)	Approval/ Deputation	Elapsed Time in Mos.	No. of Agents	Purpose
1.	09/10/86 (Init)	09/23/86	.50	6	Exec. Protection
2.	01/30/87 (Init)	04/15/87	2.50	4	Investigation
3.	04/23/87 (Ext)	06/15/87	1.75	7	Exec. Protection
4.	04/30/87 (Init)	07/15/87	2.50	3	Investigation
5.	12/07/87 (Init)	02/16/88	2.25	2	Investigation
6.	04/11/88 (Init)[1/]	7/12/88	3.00	6	Large Scale Invest.
7.	07/xx/88 (Ext)	08/15/88	1.00	6	Exec. Protection
8.	06/13/88 (Ext)	08/03/88	1.75	2	Investigation
9.	06/30/88 (Ext)	07/18/88	.50	4	Investigation
10.	07/01/88 (Ext)	08/15/88	1.50	2	Investigation
11.	11/23/88 (Init)	2/	14.25	6	Large Scale Invest.
12.	12/02/88 (Ext)	04/28/89	4.75	6	Large Scale Invest.
13.	12/16/88 (Ext)[1/]	01/29/89	1.50	6	Large Scale Invest.
14.	03/02/89 (Init)	03/14/89	.50	10	Large Scale Invest.
15.	03/02/89 (Init)	03/12/89	.50	6	Large Scale Invest.
16.	03/31/89 (Init)	05/29/89	2.00	1	Investigation
17.	04/04/89 (Init)	04/28/89	.75	14	Large Scale Invest.
18.	04/20/89 (Init)	Denied[3/]	9.00	1	Investigation
19.	05/23/89 (Ext)	06/26/89	1.00	6	Investigation
20.	05/23/89 (Ext)	06/15/89	.50	4	Investigation
21.	05/24/89 (Ext)	06/30/89	1.25	6	Investigation
22.	06/02/89 (Ext)	Pending	7.75	1	Investigation
23.	06/07/89 (Ext)	06/15/89	.25	7	Investigation
24.	06/07/89 (Init)	07/14/89	1.25	2	Investigation

	Date of Application (Initial/Extension)	Approval/ Deputation	Elapsed Time in Mos.	No. of Agents	Purpose
25.	06/07/89 (Ext)	Denied 3/	9.00	11	Investigation
26.	06/09/89 (Ext)	07/14/89	1.25	1	Investigation
27.	06/28/89 (Init)	4/	4.25	4	Investigation
28.	07/18/89 (Init)	08/30/89	1.50	4	Large Scale Invest.
29.	07/18/89 (Ext) 5/	Denied 3/	8.25	1	Investigation
30.	07/27/89 (Init)	Denied	6.00	6	Investigation
31.	08/15/89 (Init)	Denied	5.25	2	Investigation
32.	08/23/89 (Init)	Pending	5.00	5	Large Scale Invest.
33.	10/10/89 (Ext)	Pending	3.50	1	Investigation
34.	11/03/89 (Init)	Denied 3/	3.75	1	Investigation
35.	11/03/89 (Init)	02/16/90	3.75	1	Investigation
36.	11/03/89 (Init)	03/05/90	4.00	1	Investigation
37.	11/03/89 (Init)	Pending	2.75	1	Investigation
38.	11/13/89 (Ext)	Pending	2.75	1	Investigation

1/ Extensive followup required for initial approval and later request for continued authority.

2/ Request delayed in DOJ (misdirected, etc.). Was added to 04/04/89 application (No. 16) and resubmitted, before being approved on 04/20/89.

3/ Due to lengthy approval process, other alternatives were used for special agent protection.

4/ Per DOJ request, resubmitted on 11/03/89 as four separate requests for deputation. (Nos. 34-37)

5/ Per DOJ request, resubmitted on 10/10/89. (No.33)

UNITED STATES DEPARTMENT OF COMMERCE
The Inspector General
Washington, D.C. 20230

FEB 21 1990

Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This is in response to your letter dated February 2, 1990, which seeks information from this office regarding a number of issues that are of considerable concern and interest to the Inspector General community. I am pleased to provide the information requested, as well as our views on these important matters.

The first area addressed in your letter is the question of whether general law enforcement authorities should be extended to Inspector General (IG) investigators, particularly the authority to carry firearms. For ease of reference, we have organized our response to correspond with the specifically lettered and numbered questions in your letter.

A. IG personnel at the Department of Commerce have no statutory authority to carry weapons.

B. This question is not applicable to our office.

C. The lack of firearms authority has not caused any significant problems in performing the mission of this office to date. It has always been our practice to avoid placing IG personnel in danger and we have thus far been extremely successful in that regard. On the few occasions when we have identified a potentially hazardous situation, we have sought assistance from other law enforcement authorities. For example, during the course of one investigation, it was necessary to conduct interviews in a reputedly dangerous neighborhood, so the IG investigator requested assistance from the Marshals Service. This arrangement was entirely satisfactory and we believe that most situations encountered by our agents can be handled effectively in a similar fashion.

D. Our investigators all receive instruction in the use of firearms during the basic criminal investigator training course. If firearms authority were granted and we elected to exercise such authority, all investigators would be subject to an annual requalification requirement. We would also need to purchase three or four weapons for the office. We believe, however, that the additional costs could be absorbed by our current training and operations budgets.

E. If firearms authority were granted and we elected to exercise such authority, we would definitely limit the wearing of firearms to those situations when it was determined that there was a real and reasonable expectation of danger and no alternative safety measures or protective services were available.

F. The work performed by investigators in this office has not required us to request deputation by the Marshals Service to date. If necessary, we would follow the procedures established by the Department of Justice, as set forth in a letter dated May 8, 1989, from Acting Associate Attorney General Joe D. Whitley, a copy of which is enclosed.

Your second area of inquiry involves the issue of whether IG personnel should have the power to execute search and/or arrest warrants. We believe that such authority would be extremely useful in the performance of our audit and investigative functions, although not essential. In our opinion, however, the power to arrest should not be granted without the concomitant authority to carry a firearm. Likewise, the power to execute a search warrant should only be granted if it is accompanied by the authority to make an arrest and carry a firearm.

In response to your third area of inquiry, please be advised that this office has not provided any protective services to the Secretary of Commerce during the past five years.

Finally, we wish to make clear our serious concern about the Office of Legal Counsel's recent attempts to impose unwarranted limitations upon the authority of all inspectors general. Although the "Kmiec I" opinion has not directly interfered with the exercise of the Inspector General's duties at the Department of Commerce, attempts to apply it to other agencies and statutory frameworks have made it increasingly clear that the opinion is both misguided and unworkable for the IG community as a whole. We believe that the OLC's interpretation of the Inspector General Act is unduly restrictive and that it fails to recognize the broad and vital role of the IGs in the federal law enforcement process. More significantly, the actions of the

OLC have forced many IGs to second-guess their own authority and have hampered the completion of legitimate investigations of fraud and abuse. We are extremely concerned that our own mission may be adversely affected if the OLC continues along this path. As requested by Steve Ryan, enclosed are some materials concerning this office's dispute with the Department's Office of General Counsel on the topic of civil fraud.

I hope that the information and insights that we have provided will be of some assistance to the Committee. If you require additional information or have any questions regarding the substance of our response, please feel free to contact Elizabeth Barlow, Deputy Counsel to the Inspector General, at 377-5992.

Sincerely,

Francis D DeGeorge

Francis D. DeGeorge
Inspector General

Enclosures

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL

THE INSPECTOR GENERAL

March 2, 1990

The Honorable John Glenn
United States Senate
Chairman, Committee on Governmental Affairs
Washington, D.C. 20510

Dear Senator Glenn:

Thank you for your February 2, 1990, letter providing the opportunity to furnish you with information concerning issues of law enforcement authority which are of vital importance to the Inspector General community. Over the past 10 years I have had the privilege to serve as an Inspector General. During that time the mission of the respective Inspectors General offices has gradually evolved to the point where additional authorities are immediately required. You stated that you have been concerned, over the last several years, that Inspector General personnel are being placed in unnecessary physical danger by carrying out their duties without law enforcement powers, including carrying firearms. I share your concern.

Every day my investigators attempt to locate and interview individuals who have defrauded the government. Often these people reside in some of the worst neighborhoods in major cities in the country. These are high crime areas where drug users and dealers conduct business and anyone appearing to represent the law is at risk. I recently was asked by Mr. Steve Ryan how I felt about this problem. I told him that I lived in fear that one of my investigators would be killed or otherwise harmed while performing his or her job. These are criminal investigators and they deal with criminals. They should be provided with the appropriate tools to do so without the additional anxiety of possibly being physically harmed.

Enclosed are my responses to the questions posed in your letter of February 2, 1990. I strongly support the provisions of Senate bill 2080 which has recently been introduced to grant full law enforcement authority to Inspector General criminal investigators. This is an immediate problem that requires immediate action by the Congress.

Page 2 - Honorable John Glenn

I hope this response adds to the information you will receive from other Inspectors General and is convincing in gaining your support in our effort to obtain full law enforcement authority. I am available to meet with you and discuss this important issue at length if you so desire. Please do not hesitate to contact me if I can be of further assistance.

Sincerely,

James B Thomas Jr

James B. Thomas, Jr.

Enclosure

ENCLOSURE

U.S. DEPARTMENT OF EDUCATION
Office of Inspector General

Responses to Questions from
Senator Glenn's Letter of 2/2/90

QUESTION 1

A. The governing statute of the Department of Education (ED) does not permit OIG personnel to carry weapons.

B. Not Applicable.

C. The lack of firearms authority causes many problems for Department of Education OIG investigators. Probably the most significant, but not measurable, impact is the reluctance of these investigators to aggressively pursue the subjects and witnesses of their cases into high crime areas. I feel that our investigative effort suffers as a result of this inhibiting factor.

Another problem is our reliance on other law enforcement agencies to serve search warrants and make arrests, when such actions are required. My investigators work many cases jointly with the FBI, Postal Inspection Service and Immigration and Naturalization Service. We have to rely on these other agencies to accompany us on interviews, contingent upon their availability. This is not an efficient method of doing business. Additionally, if the occasion should arise, a safety issue would be present if the agents were confronted with a hostile situation. An obvious dangerous situation would exist if the armed agent was required to divert attention from the source of the hostility to protect the I.G. investigator.

In order to furnish you with examples of agents being unnecessarily placed in danger, I have attached numerous pages of responses received from my investigators in the field (Attachment A). I have also furnished you with a book of incidents compiled by the Association of Federal Investigators that sets forth hundreds of situations where OIG investigators found themselves in risky situations (Attachment B). As you can see, OIG investigators conduct business in areas where, and during times when, other law enforcement officers who possess full law enforcement powers would not go unless they were armed.

D. Additional equipment expenses would be minimal since we already have approximately fifty firearms in our inventory. Other weapons are available free of charge through other law enforcement agencies that find themselves with excess weapons. Additional training would consist of requalifying those agents who have not recently done so. All OIG agents are initially given extensive firearms training at the Federal Law Enforcement Training Center or at the academy where they received their initial law enforcement training. A refresher course would be all that would be necessary in most cases.

E. It is most difficult to predict what limitations, if any, I would impose if full law enforcement authority is granted. I believe, however, that it should be applied consistently throughout the law enforcement community. If my agents were granted such authority, I would ensure appropriate utilization of it, as do all other organizations that currently have full law enforcement authority.

F. 1. Attached is a copy of a letter dated May 8, 1989 from Joe D. Whitley, then Acting Associate Attorney General to William R. Barton, Inspector General for the General Services Administration (Attachment C). In this letter Mr. Whitley details the procedures to be followed in requesting Special United States Marshal Deputations to allow Inspector General Special Agents to carry firearms while conducting specific criminal investigations. These are the procedures currently being followed.

2. During the last calendar year, it has taken approximately 27 days for the Department of Justice and U.S. Marshals Service to review and either approve or deny requests for special deputations of ED-IG Special Agents.

3. During the last calendar year, we have requested special deputation for four Special Agents. Two were approved. One was denied because the Department of Justice felt that local law enforcement officials could locate the subject and serve subpoenas in a high crime area of Baltimore, MD (Attachment D). The fourth request has not yet been answered.

4. The procedures detailed by Joe Whitley in his letter to William Barton state that his office will reconsider a request previously denied if we believe that investigative circumstances have changed since the earlier denial.

5. The Department of Education, Office of Inspector General, has never received blanket authorization for any purpose. When we have requested special

deputations for the purpose of protecting the Secretary of Education we have been required to identify each individual to be deputized, describe the previous law enforcement experience of each and provide the firearm qualification score and date of each.

6. We have not had any requests denied by the Department of Justice that have been requested by a United States Attorney's Office.

7. U.S. Marshal special deputations issued to us expire the following June 30. Each deputation is valid only for the purpose described on the deputation, i.e. secretarial protection, a specific investigation, etc. We have had a number of instances in which a special agent is deputized for secretarial protection purposes and must reapply to be redeputized for a specific case. In the past, the renewal process has been relatively quick.

QUESTION 2

There is an actual, not just perceived, lack of authority to execute judicially approved search and arrest warrants. When the execution of a search or arrest warrant is necessary in an OIG case, my investigators are required to obtain the assistance of a member of a law enforcement agency empowered to serve such warrants. This procedure is cumbersome and oftentimes results in delays in serving the warrants while the assisting agency is brought up to speed regarding the investigation and the probable cause to justify the warrant. I believe it would be more efficient and cost effective if Inspector General personnel had the authority to seek and serve both search and arrest warrants.

QUESTION 3

At present the OIG does not provide any protective service for the Secretary and has not since June 1989.

During the tenure of the previous Secretary, we coordinated with his staff all travel outside of Washington, D.C. OIG personnel performed advance security arrangements, contacting local law enforcement agencies, making reservations at hotels, renting vehicles, meeting the Secretary and driving him to all events, being with him at all public events during his stay and making arrangements with the airlines regarding security. All personnel engaged in this activity were deputized.

From February 1982 through June 1989, the period our agents were involved in actual physical protection of the Secretary, we spent approximately 12.5 staff years on this effort.

QUESTION 4

Regarding the "Kmiec I" memorandum and the second memorandum to which you refer (the issue involving the Department of Health and Human Services IG and investigations of Federal Drug Administration problems), my organization has not yet been affected. All subjects of audits and investigations are recipients of Department funding and the Department does not have a regulatory function.

ATTACHMENT A

UNITED STATES DEPARTMENT OF EDUCATION
REGIONAL OFFICE OF INSPECTOR GENERAL
50 UNITED NATIONS PLAZA
SAN FRANCISCO, CALIFORNIA 94102

OFFICE OF AUDIT
(415) 556-2711

OFFICE OF INVESTIGATION
(415) 556-6726

February 13, 1990

MEMORANDUM

TO: Mr. Thomas D. Strong
Director
Division of Field Operation

FROM: Wen (Nancy) Petersen
Supervisory Special Agent
Los Angeles Field Office

SUBJECT: Law Enforcement Authority

The purpose of this memorandum is to cite recent examples where the carriage of firearms and full law enforcement authority would have been beneficial for Special Agents of the U.S. Department of Education (USED), Office of Inspector General (OIG), Los Angeles, California, Field Office. They are as follows:

1. During October 1989, a SFA subject was arrested by the Los Angeles Police Department (LAPD) at the request of USED-OIG and California Student Aid Commission investigators. The arrest was later challenged in a Preliminary Hearing because LAPD did not investigate the allegations; had little probable cause, and was merely assisting other agencies. If the arrest had been made by OIG agents, the legal challenge would not have been an issue.

2. During November 1989, a joint school investigation by California Attorney General's Office (CAGO) and OIG involved a full-scale search warrant of a school premises located in a high-crime area in downtown Los Angeles. CAGO agents were fully armed and wore body armor jackets. CAGO intelligence reports disclosed the possibility of weapons possessed by the suspects. OIG Agents were requested to assist as part of the search team for technical assistance, but were unarmed in what could have been a dangerous situation.

ALASKA, ARIZONA, CALIFORNIA, HAWAII, IDAHO, NEVADA, OREGON, WASHINGTON AND THE PACIFIC BASIN

3. During December 1989, a convicted felon with a history of violent crime was called into his probation office to revoke his probation status. This individual was a subject of SFA fraud, and was to be interviewed by OIG agents. When the subject was confronted by his probation officer regarding false identities for PLUS loans, he resisted arrest, struck a police officer, and fled the scene. He was later apprehended.

4. During December 1989, an interview was conducted in an illegal drug neighborhood which was sealed off by Los Angeles Police Department (LAPD). The status of the neighborhood was unknown to OIG agents prior to going to the area. In addition, the interviewee had no transportation, and the OIG agents wanted to obtain documentary evidence from the interviewee.

5. During January 1990, while an OIG agent and a California Student Aid Commission (CSAC) investigator were awaiting the arrival of a subject outside of an apartment residence during evening hours, the agents observed what appeared to be illegal drug transactions.

Additionally, SFA fraud cases often involve the use of false identities; therefore, NCIC and local checks will not confirm arrest histories. A subject interview during January 1990 disclosed the individual to be an illegal alien which was previously unknown.

Thank you for your consideration in this matter.

cc: Mr. Robert Gonzalez, RIGI

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF INSPECTOR GENERAL
Atlanta, Georgia 30[illegible]1

March 1, 1990

Office of Audit Services
POST OFFICE BOX 1598
404-331-5862

Office of Investigation Services
POST OFFICE BOX 874
404-331-2087

MEMORANDUM

TO : [redacted]
Division of Field Operations

FROM : [redacted]

SUBJECT : Instances of Being at Risk
Re: Law Enforcement Authority

Below are comments by OI Agents in Region IV relative to above subject matter.

[redacted] - BIRMINGHAM, AL.

During the course of investigating the Birmingham College of Allied Health, many students and former employees were interviewed. Because many of the students and employees could not be located, criminal histories were requested. Several of the students and employees had criminal histories involving drugs, armed robbery and assault. Because of the locations, projects, high crime areas, etc., the risks were unacceptable for unarmed agents to go into these areas and conduct interviews. Further, at some future date(s), many of the employees may have to be arrested. At that time we will have to wait until the FBI or the Marshall Service has time to assist in the investigation.

[redacted] - MIAMI, FLORIDA

During the investigation of the [redacted] in Miami, it was determined that many of the students were recruited from welfare lines, projects, and from local street corners. In most cases these students resided in the Liberty City/Overland sections of town. Because of the high risk to the agent's safety, the Assistant U. S. Attorney requested our agents be granted firearm authority while conducting investigations in the Miami area.

[redacted] - MIAMI, FL.

Entered Liberty City section of Miami attempting to locate subject for interview regarding Student Loan Fraud. Sought assistance and cooperation of Postal Inspection Service under mail fraud statute. Was first trip to Miami area and was not aware, until advised by Postal, that area was extremely hazardous and the police only go into the area in pairs during daylight hours.

[redacted] - WEST POINT, MS.

You don't get more rural than this. Self and another agent (female) were attempting to locate former school employees for interviews. Address eventually turned out to be non-existent (vacant lot). Activity was conducted after normal business hours when most likely to find people home. We were subsequently advised by authorities that area was extremely hazardous with 3 recent homicides.

The current environment today, with drugs permeating all areas of society, makes it impossible to predict or anticipate what you may run into in any area. This is especially true in unknown neighborhoods of unfamiliar metropolitan cities into which OIG agents are required to travel.

[redacted] - TAMPA, FL.

The subject of [redacted] has threatened several employees of the school and is known to be armed. He has made verbal death threats to the state investigator that is working the case with me. The subject appears very unstable. The case is also requiring the locating and interviewing of witnesses. This will require going into major drug areas to locate some of these people. Firearms authority was requested in November 1989, but has not been received to date. I am at risk at this time on this case due to the unstable nature of the subject and the area which I must go in to work the case.

[redacted] - NASHVILLE, TN.

The subjects of the [redacted] University case are known drug users. The case will require going into high crime infested neighborhoods to locate and interview witnesses.

In the case of [redacted] t al, one of the subjects is a convicted felon. The case may also require execution of a search warrant at residence of subject.

The above are examples of my current case load. As can be seen, it is a normal part of my job to spend substantial time in very high risk neighborhoods. The time spent in these areas are in many cases done on short notices so information critical to the case can be obtained. I consider that I have been put at unnecessary risk for my safety when I had to go into these high crime, drug infested areas unarmed or work cases where the subject is unstable, threatening or known to be on drugs. Other law enforcement officers are not asked to conduct the activities we do on a regular basis unarmed.

[redacted] - MIAMI, FL.

During the course of the [redacted] investigation, I was asked to provide assistance by interviewing individuals located in a high crime/drug area in Miami, Florida (Liberty City). Most of these individuals could not speak English. In many cases, these individuals could not be contacted during regular hours (8:00 a.m. - 5 p.m.), so it became necessary to obtain the assistance of another law enforcement agency who carried weapons, spoke the language and knew the area. The INS Agent assigned commented that this was a very dangerous area and that he did not feel comfortable armed, let alone unarmed at night.

[redacted] - MEMPHIS, TN.

Several hostile and sometimes uncooperative targets have been identified during the course of this investigation. These targets include former employees and students at [redacted], Memphis, Tennessee. As a result, subpoenas had to be served by me and another unarmed Agent in this office. We often had to go into rough neighborhoods. These neighborhoods were visited at night after several unsuccessful attempts were made during the day.

MEMORANDUM

U.S. DEPARTMENT OF EDUCATION
REGIONAL OFFICE OF INSPECTOR GENERAL

TO: [redacted]
Director, Division of Field Operations

DATE: FEB 27 1990

FROM: Regional Inspector General for Investigation
Philadelphia, PA

SUBJECT: Impediments to Investigators Lacking Law Enforcement Authority

According to your voice mail request of February 12th, there are attached two summaries of instances where our agents have been in potential danger.

Please note that for [redacted], there were other unsuccessful attempts to interview her, where the agents would have had some control over the environment. Edwards was not interviewed. Dozens of former [redacted] students and employees who were interviewed in crime-ridden areas of Philadelphia. The FBI had withdrawn from the investigation, so our agents were on their own.

Also attached is a notice we received recently from the Postal Inspection Service relating to reward posters for the murder of law enforcement officers.

[redacted]

TRANSMIT BY FAX

OFFICE OF INSPECTOR GENERAL
OFFICE OF INVESTIGATION
U.S. DEPARTMENT OF EDUCATION

86-030278

On January 21, 1987, at approximately 1:00 pm, Special Agents [redacted] ED/OIG, attempted to interview [redacted] former student, [redacted], Philadelphia, PA, at her residence. We discovered that [redacted] lives in a tenement house in one of the worst areas in the city of Philadelphia. In addition, a hostile atmosphere prevailed upon surveying the grounds o.' the tenement house, jeopardizing the safety of the investigators. It was decided it would be prudent to conduct the interview with additional security or at another location.

IDENTIFYING DATA:

NAME: [redacted]
ADDRESS: [redacted]

TEL: None

[redacted]

1/21/87

[redacted]/2/10/87

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U.S. DEPARTMENT OF EDUCATION
3535 MARKET STREET
PHILADELPHIA, PENNSYLVANIA 19104

REGIONAL OFFICE OF
INSPECTOR GENERAL

MEMO TO FILE 2/27/90 [redacted]

In September 1989, while attempting to interview [redacted], former [redacted] ED/OIG and [redacted] FBI received threatening comments from three to four young neighborhood toughs. The threat related to the slashing of tires on the Bureau car. The climate on the 1300 block of East 88th Street was so intensely hostile to law enforcement personnel that other witnesses were too intimidated to talk to these agents. [redacted] declined to speak with the investigating agents at his residence or at the FBI office for fear that he would be labelled a snitch. Subsequent to several visits to this area, the agents were advised that a law enforcement agent had been slain while conducting an investigation in this block.

In November 1989 Agents [redacted] had an appointment to interview [redacted], at a project on East 55th Street. Upon leaving the car, a neighborhood school crossing guard approached us and advised us to enter the site with extrene caution. Moreover, we encountered a public gas works employee in the project courtyard who said, "I hope the two of you are armed."

While investigating the same case, we encountered on numerous occasions a mentally unstable person who resided in the same building as a former [redacted] This individual was in no way involved in the investigation but posed a potential threat to the investigating agents. His apartment was the first door in the building and he always came to the front porch and made lewd and threatening overtures. This individual was recently released from a mental institution. On one occasion neighbors in the community complained to us of the threat he posed because they thought we were welfare department employees.

US POSTAL INSPECTION SERVICE

ELECTRONIC MESSAGE

DATE/TIME SENT: 08-Jan-1990 08:18am EASTE
SENDER: [redacted]
LOCATION: MANAGEMENT ANALYSIS BRANC
TELEPHONE NUMBER: PEN 268-4429

TO: See Below

Subject: Special Agent Safety

FROM: [redacted]

TO: ALL REGIONS
ALL DIVISIONS

RECENT LIAISON WITH THE INDIANA STATE POLICE (ISP) DETERMINED THE FOLLOWING INFORMATION WHICH IMPACTS DIRECTLY ON LAW ENFORCEMENT OFFICER/SPECIAL AGENT SAFETY.

1. POSTERS HAVE APPEARED IN INDIANA WITH INFORMATION CONCERNING REWARDS TO BE PAID FOR THE MURDER OF LAW ENFORCEMENT OFFICERS. INFORMATION ON THE POSTERS IS QUOTED BY THE ISP AS FOLLOWS:

   > "REWARD, $5,000 FOR THE MURDER OF ANY ACTIVE DUTY LAW ENFORCEMENT OFFICER IN THE UNITED STATES. JUST DO IT. WE'LL FIND YOU. JOIN THE POLICE AND FLOWERS ACTION SQUAD. FILL THEIR STINKING CEMETERIES WITH HUMAN GARBAGE. YOU KNOW WHO YOU ARE. THE SATANIC REVOLUTIONARY CIRCLE.

2. THE ISP FURTHER REPORTED THAT THE SATANIC REVOLUTIONARY CIRCLE IS ALSO KNOWN AS THE SATANIC REVOLUTIONARY CULTURE WHICH IS BASED IN CINCINNATI, OHIO. THESE POSTERS HAVE ALSO BEEN DISTRIBUTED IN KENTUCKY. THE ISP INQUIRY WITH THE CINCINNATI POLICE DEPARTMENT DETERMINED THAT THIS THREAT IS FACTUAL AND IS NOT CONSIDERED TO BE A HOAX.

3. THIS INFORMATION IS PROVIDED FOR SPECIAL AGENT SAFETY. SPECIAL AGENTS WORKING IN THE AREAS WHERE THESE POSTERS HAVE BEEN SEEN SHOULD BE ESPECIALLY ALERT TO THIS INFORMATION. ADDITIONALLY, THIS INFORMATION SHOULD BE SHARED WITH THOSE LAW ENFORCEMENT OFFICERS/AGENCIES WHO MAY BE INTERESTED/CONCERNED.

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Assault on a special agent

Location and Date of Event

Springfield, Massachusetts - May 1986

Description of Event

During an investigation involving illegal aliens who received Title IV proceeds by misrepresenting their citizenship, an OIG agent accompanied an INS agent during the arrest of two brothers. During the pat-down stage of the arrest, the two subjects assaulted both the INS agent and the OIG agent.

Solution

If OIG special agents had arrest authority, this assault may have been prevented.

Agency File Number:

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Undercover operations

Location and Date of Event

Quincy, Massachusetts - July 15, 1988

Description of Event

An investigation of Title IV activities at a beauty school involved an undercover operation. An OIG special agent, wearing a monitoring device, enrolled at the school where the majority of students were ex-convicts/parolees.

Solution

If OIG special agents were armed, the special agent could act in an undercover capacity without fear for personal safety.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Detaining known fugitives encountered or subjects who admit to crimes during interview

Location and Date of Event

Boston, Massachusetts - May, 1984

Description of Event

While conducting interviews with subjects of an investigation involving Title IV fraud, it became known to OIG agents that outstanding federal and state/local arrest warrants existed on them. OIG agents did not have authority to detain the subjects and follow-up efforts to locate and arrest the subjects by federal and state/local authorities were unsuccessful.

Solution

If OIG special agents had arrest authority, these subjects would not currently be fugitives.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Detaining known fugitives encountered or subjects who admit to crimes during interview

Location and Date of Event

Boston, Massachusetts - July, 1987

Description of Event

While conducting interviews with subjects of an investigation involving Title IV fraud, it became known to OIG agents that outstanding federal and state/local arrest warrants existed on them. OIG agents did not have authority to detain the subjects and follow-up efforts to locate and arrest the subjects by federal and state/local authorities were unsuccessful.

Solution

If OIG special agents had arrest authority, these subjects would not currently be fugitives.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Full participation in a joint investigation

Location and Date of Event

Willimantic, Connecticut - March 28, 1988

Description of Event

During a stakeout in a joint FBI/OIG investigation which involved Title IV fraud, FBI agents were informed that the OIG agents were not carrying firearms and were not authorized to make arrests. The FBI agents consequently requested additional FBI assistance to effect the arrest.

Solution

If OIG special agents had full law enforcement authority, they would have been able to effect the arrest of the subject.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Locating and interviewing subjects in unsafe areas

Location and Date of Event

Boston, Massachusetts - 1985 - Present

Description of Event

Investigation of trade school activities as it relates to Title IV programs has required OIG agents to conduct interviews and surveillances and serve subpoenas in urban, impoverished areas. Frequently these are high crime areas in which illegal drug and weapon activity takes place. Many of the witnesses in these areas are convicted felons. Some of those interviewed have been convicted of assaults on law enforcement officers. OIG agents are not always able to have local police officers or full law enforcement authority federal agents as escorts. Conducting interviews in such areas have often been delayed until escorts could be obtained. One case required OIG agents to spend a great deal of surveillance time in a high crime area. OIG agents later learned that drug dealers in this area had positioned look-outs and snipers armed with high powered rifles to protect their activities against law enforcement raids.

Solution

If OIG special agents were armed, they would have been able to conduct investigations in unsafe areas expeditiously without having to wait for a law enforcement escort.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Unable to obtain records as not recognized as a law enforcement officer.

Location and Date of Event

Boston, Massachusetts - 1981 - 1983

Description of Event

During the period [illegible] through 1983 the security director of a telephone company refused to recognize the OIG as a law enforcement agency and therefore would not grant the OIG telephone subscriber records. The security director supported his decision by stating that he would only recognize those agencies that had full law enforcement authority.

Solution

If OIG special agents had full law enforcement authority, they would have been provided with necessary investigative documents.

Agency File Number:

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Dealings with known violent criminals

Location and Date of Event

Scituate, Massachusetts - 1987 - Present

Description of Event

The subject of this case, which involves Title IV fraud, has lengthy juvenile and adult criminal records. One incident included assault and battery on a police officer and property damage charges. These charges were brought by State Police following a car chase where two police cruisers were damaged. Following the arrest, the subject escaped from police custody. The subject is currently wanted by the State Police Violent Fugitive Squad.

Solution

If OIG special agents had full law enforcement authority, they would be able to apprehend this fugitive without having to request assistance from armed law enforcement personnel.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Locating and interviewing subjects in unsafe areas

Location and Date of Event

Boston, Massachusetts - August 25, 1988

Description of Event

During an investigation involving conspiracy to defraud a Federal Grant Program, OIG special agents interviewed two brothers at their residence. During the course of the interview, the brothers mentioned the names of several of their associates. One associate's name in particular was known by the FBI and DEA to be involved in large scale drug trafficking and to have ties to organized crime members.

Solution

If OIG special agents were armed, they would have been able to conduct investigations without fear for their personal safety.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Locating and interviewing subjects in unsafe areas

Location and Date of Event

Boston, Massachusetts - August 26, 1988

Description of Event

During an investigation involving a conspiracy to defraud a Federal grant program, OIG special agents interviewed a witness at his residence. OIG special agents were told by the witness that he had recently been shot in his neighborhood. The witness stated that the shooting occurred following the witness's request for a man to get off the hood of the witness's car.

Solution

If OIG special agents were armed they would have been able to conduct investigations in unsafe areas expeditiously without fear for their personal safety.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Service of subpoena in unsafe areas

Location and Date of Event

Boston, Massachusetts - 1983 - Present

Description of Event

Investigation of trade school activities as it relates to Title IV programs has required OIG agents to conduct interviews and surveillances and serve subpoenas in urban, impoverished areas. Frequently these are high crime areas in which illegal drug and weapon activity takes place. Many of the witnesses in these areas are convicted felons. Some of those interviewed have been convicted of assaults on law enforcement officers. OIG agents are not always able to have local police officers or full law enforcement authority federal agents as escorts. Conducting interviews in such areas have often been delayed until escorts could be obtained. One case required OIG agents to spend a great deal of surveillance time in a high crime area. OIG agents later learned that drug dealers in this area had positioned look-outs and snipers armed with high powered rifles to protect their activities against law enforcement raids.

Solution

If OIG special agents were armed, they would have been able to conduct investigations in unsafe areas expeditiously without having to wait for a law enforcement escort.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Unable to obtain records as not recognized as a law enforcement officer

Location and Date of Event

Boston, Massachusetts - 1983 - Present

Description of Event

An official in a state motor vehicle department would not grant the OIG telephonic access to driver and motor vehicle records because he questioned whether or not the OIG was a full law enforcement agency.

Solution

If OIG special agents had full law enforcement authority, they would be provided with this necessary investigative information.

Agency File Number: [redacted]

✓

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Subject Interview

Location of Event

Providence, Rhode Island

Description of Event

An ongoing investigation will require OIG Agents to interview the subject of the investigation. Subject is known to have ties to organized crime.

Because of potential danger involved, RIG has instructed OIG Agents not to participate in interview and to request another law enforcement authority to conduct interview.

Agency File Number: [redacted]

United States Department
of Education
Office of Inspector General

Need For Full Law Enforcement Authority

Dealings with known violent criminals

Location and Date of Event

Boston, Massachusetts - August 26, 1988

Description of Event

During an investigation involving a conspiracy to defraud a Federal grant program, OIG agents conducted a witness interview in an area which had been plagued with drug and gang related shootings. Three days prior to the interview, a young child was mistakenly shot to death in a gang related shoot-out. This shooting occurred one block from the witness's residence. The witness who was interviewed has a lengthy criminal record which included charges of assault and battery.

Solution

If OIG special agents were armed, they would have been able to conduct investigations in unsafe areas without fear for their personal safety.

Agency File Number: [redacted]

Office of Inspector General
Washington DC 20420

Department of
Veterans Affairs

MAR 16 1990

In Reply Refer to: (53E)

The Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

I am pleased to reply to your February 2, 1990, letter concerning law enforcement powers for personnel of the Office of Inspector General (OIG). I have the following responses to the questions you asked in your letter:

I. A. Does the governing statute of the Department of Veterans Affairs (VA) permit OIG personnel to carry weapons?

No; however, in 1973 the Administrator of Veterans Affairs (now the Secretary, Department of Veterans Affairs) was given the authority to make arrests and to arm VA special investigators. This authority was contained in the National Cemeteries Act of 1973 (P.L. 93-43, Section 218(a)(3)). The authority to carry weapons was delegated to a very limited number of investigators for the purpose of protecting the Administrator. This authority was not further used and following creation of the Inspectors General in 1978, the authorization to arm investigators in the VA was deleted by an amendment to Title 38, U.S. Code. (P.L. 98-528, Section 101(a)(1)).

B. If the answer to question "A" was yes, please describe the specific firearms training provided OIG personnel.

Not applicable.

C. If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where Inspector General personnel may have been unnecessarily placed in danger as a result.

There have been instances reported by our agents when they could not satisfactorily complete an investigation because they were unable to interview an individual who either had a record of violent, criminal behavior, or the person resided in a high crime area. There has been at least one incident in which our agent was accosted and threatened with bodily harm during an investigation in a high crime area. To add to the difficulty of such situations, our agents must work alone most of the time due to personnel limitations. At the present time approximately 20 percent of our non-supervisory field agents are female.

We have a further problem with our inability to execute a search warrant because our agents lack arrest and weapons carrying authority. Search warrants must be referred to other law enforcement organizations for execution. This usually delays the timely completion of an investigation.

D. What additional training and expenses would be included if firearms authority was provided Inspector General personnel?

In order to meet DOJ's requirements for deputation, our agents are qualifying with small arms on a quarterly basis. This is being done in an approved firearms course, under a qualified instructor. Should full law enforcement authority be granted to Inspector General personnel, I believe our expenses would be limited to the cost of purchasing some additional weapons and equipment for the remainder of our agents, and the procurement of ammunition for practice and qualification.

E. What limitation would you place on such powers if granted?

VA OIG agents would only be authorized to carry firearms during the performance of their official duties that require the agents to be armed. A complete set of procedures would be developed that would outline the control and use of weapons by our agents.

F. It has been suggested that deputation as Special Deputy U.S. Marshals may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation.

The proposed deputation of OIG agents as Special Deputy U.S. Marshals has been discussed with Department of Justice (DOJ) representatives. We were informed that while DOJ will consider each such request on its own merits, DOJ is opposed to the proliferation of weapons in the Government, especially among the Inspectors General. We were told that deputation will be authorized only in very exceptional circumstances. You also asked the following questions with respect to deputation:

1. What is the procedure for obtaining authorization for appointment as a Special Deputy U.S. Marshal for your personnel? Which officials within your agency or at DOJ must approve such deputations?

The first such request from our office is now being prepared. Our experience in this area, therefore, is limited. According to a letter from the Acting Associate Attorney General, dated May 8, 1989, requests for deputation should be submitted to the Deputy Assistant Attorney General, Criminal Division. There is no requirement that our requests for deputation be submitted through the VA. It is our understanding that DOJ's decision on each request, will be sent to the Director, U.S. Marshals Service, who will reply to me.

2. On average, how long does the process for reviewing requests for these appointments take?

DOJ representatives have stated they expect to make a decision on requests for deputation in approximately 2 weeks.

3. How many requests for deputation have you sent to DOJ during the past year? How many have been denied? For what reasons?

There have been no prior requests.

4. Is there any avenue for reconsideration of denial of a request for deputation?

According to DOJ's May 8, 1989, letter, requests that are not approved may be reconsidered when the investigative circumstances supporting DOJ's initial conclusions have changed.

5. Under what circumstances are "blanket" approvals granted? How many have been requested and how many have been granted since January 1, 1990?

I am not aware of the specific circumstances of any "blanket" authorizations granted by DOJ.

6. Are requests that agents be deputized ever denied by DOJ even though they have been requested by the pertinent U.S. Attorney's office?

I do not have any information concerning requests for deputation that had the approval of a U.S. Attorney but were subsequently denied by DOJ.

7. How long does a Marshal's appointment last? What is the procedure for renewal of a deputation? How long does this process take?

It is our impression that appointments as Special Deputy U.S. Marshals are for 1 year, or for the period of a specific investigation, if less than a year, and that requests for a renewal of a deputation would follow the same procedure as the original request.

II. Should the power to execute judicially approved search and arrest warrants be given to Inspector General personnel?

I strongly favor granting this authority. It provides another tool for investigating fraud. Situations in which agents have a need to execute search or arrest warrants are becoming more commonplace. At the present time, we must turn such cases over to other Federal or local law enforcement organizations to do this. There is always a risk that evidence will be destroyed in the meantime, or that the suspect will go into hiding. Our agents have reported at least 10 instances during the past year in which search or arrest warrants were needed in order to complete the investigation. The need to turn these cases over to another agency could be a factor in allowing some individuals to flee. Also, in an earlier case, a delay of 1 year was encountered before an arrest warrant could be executed and the investigation completed.

III. Describe the protective services, if any, furnished by the OIG for the head of the VA during the past 5 years.

The OIG has not had an occasion to furnish protective service for the Secretary of Veterans Affairs during the past 5 years.

IV. Please provide the Committee with any comments you may have on the impact of two memorandums issued by the Office of Legal Counsel concerning limitations DOJ has sought to impose on OIG audit and investigative activities (particularly "Kmiec I" dated March 9, 1989).

I am aware of the impact of Assistant Attorney General Kmiec's March 9, 1989, memorandum regarding the authority of the Inspectors General to conduct regulatory investigations. I do not believe this memorandum adversely affects our investigative operations, at least at this time. The reason being that the VA does not have a statutory responsibility to monitor compliance by the public with Federal laws and regulations, as does the Department of Labor, for example. As a result, our office does not get involved in regulatory-type investigations. Furthermore, I have found no opposition to our authority to audit and investigate VA programs and operations.

The Honorable John Glenn

In summary, I strongly support the position of the Inspector General community regarding the need for additional law enforcement authorities and legislative clarification of the investigative authority to clearly cover all of an agency's activities. I do not think the need in these areas can be emphasized enough. Considering the current investigative workload of most Federal agencies, I cannot visualize any adverse effect the granting of the proposed additional authorities to the Inspectors General would have on other law enforcement organizations.

Thank you for giving me this opportunity to express my views on the questions you presented.

Sincerely,

Renald P Morani

RENALD P. MORANI
Acting Inspector General

AGENCY FOR INTERNATIONAL DEVELOPMENT
WASHINGTON, D.C. 20523

THE INSPECTOR GENERAL

FEB 16 1990

The Honorable John Glenn, Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

Thank you for your letter of February 2, 1990, concerning possible legislation to provide law enforcement authority to criminal investigators of the Offices of Inspectors General. I believe that S2080 which was introduced last week and deals directly with this issue represents an attempt to provide legislation that will significantly assist in our efforts to reduce fraud, waste and abuse in the U.S. Government.

In responding to your questions, I have used the same letter and numbering system which appears in your letter.

First:

A. The Agency's governing legislation does not permit I.G. personnel to carry weapons.

B. Although the statute does not authorize I.G. personnel to carry weapons, due to our personnel policy of hiring only highly trained and experienced criminal investigators, all of our investigators have had extensive firearms training. These qualifications were earned through courses at the F.B.I. Academy in Quantico, VA, the federal Law Enforcement Training center in Glynco, GA, or at other U.S. Government Training Facilities, in connection with their previous employment with the F.B.I., IRS-Criminal Division, or with other U.S. Government law enforcement agencies.

C. With regard to problems which have occurred due to the lack of law enforcement authority, the following are submitted.

   (i) During the investigation of an A.I.D. procurement specialist, a source agreed to meet the suspect while wearing a body wire. Because our criminal investigators lacked firearms authority, the source had to meet the suspect without adequate backup protection.

(ii) In the same case, during the execution of a search warrant in coordination with the FBI, the FBI agent walked off the site during the search, thereby tainting the collected evidence, which was subsequently thrown out by the U.S. Attorney.

(iii) The resolution of an investigation of two brothers, known to have a long history of criminal activity, hinged on evidence sought during the execution of a search warrant in the Bronx, N. Y. The search and most of the investigation took place in an extremely high risk neighborhood in New York City, where normal safety required the presence of armed investigators.

(iv) Four infants died in Peru after being given a medication containing excessive potassium which was paid for through A.I.D. funds under a contract with a New York manufacturer, who misrepresented his company's ability to fulfill the contract. In order to preserve the evidence and prevent its destruction, an immediate search of the manufacturing facilities was required. This search was delayed until coordination could be made with a law enforcement agency for its agents to accompany the I.G. investigators.

(v) When about 385 million dollars in worthless Peruvian securities that were represented as having the U.S. Government's backing began appearing, their source was traced back to a Central Illinois businessman. Local and other Federal investigators effected a search which overlooked and therefore failed to seize pertinent evidence because of the investigator's unfamiliarity with the full details of the case. In addition, the suspect was later declared mentally unstable and was institutionalized. This presented a clear danger to our unarmed investigators.

(vi) In an investigation of the general manager of a contract security guard service consensual monitoring became the chief means of obtaining information regarding an alleged bribe situation. Here again a witness entered a transaction with a suspect without having sufficient backup security. In this case, both the monitoring investigators as well as the witness were put at risk. In fact, one of the key witnesses in this case was threatened with his life and we were unable to provide him adequate protection.

D. The only additional training required will be the quarterly re-certification of the investigators. Since we have identified several sources where government weapons could be made available to us at no cost, the only expense would be for ammunition, which could be covered under our already budgeted training funds.

E. If firearms authority was granted, our criminal investigators would only carry arms on a need basis, i.e., when serving a search warrant, making arrests and when working in designated dangerous areas.

F. The use of the U.S. Marshal Service's deputation system is generally impractical because it is extremely time consuming. This creates delays in investigations, lost evidence and suspects being lost. The nature of our cases do not lend themselves to this alternative. U.S. Attorneys who handle most of our cases desire fast action in cases where an immediate search is required. For example, in ongoing bribery cases consensual monitoring is often done with one to three days notice. It is not possible to obtain deputation in this period.

Second:

I concur in the proposition that full Law Enforcement Authority, including execution of search and arrest warrants, should be given to Inspector General criminal investigators and have stated my strong support for this effort on numerous occasions. Recently I wrote to the National Advisory Commission on Law Enforcement to advise it of my position on these issues.

Third:

Since this Agency does not have a Secretary as head, it does not have the statutory authority to provide protective services for its Administrator.

Fourth:

The March 9, 1989, opinion from the Office of Legal Counsel which addresses limitations on the investigative and audit activities of an Inspector General does not effect our operations to the extent that other IGs have expressed their concerns. Since the Agency does not have a regulatory function, the limits expressed in the OLC opinion are not applicable.

I appreciate your interest in the needs of our office, and your willingness to help us achieve the maximum results from the resources available to us.

If I can provide you with further information, please let me know.

Sincerely,

Herbert E. Beckington

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

MAR 6 1990

OFFICE OF THE
INSPECTOR GENERAL

The Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to respond to your February 2, 1990, letter. The issues that you raise concerning authorities for the Inspectors General are of great importance. Your willingness to focus on this matter is very encouraging. This initiative is in keeping with your strong legacy of support for our mission. The answers to the questions raised in your letter are enclosed.

If I can be of any further assistance, please let me know.

Sincerely,

David C. Williams
David C. Williams
Inspector General

Enclosure:
As stated

Law Enforcement Authorities

Question A: **Does your Agency's governing statute permit I.G. personnel to carry weapons? If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.**

Answer: Chapter 14, "General Authority," Section 161 K of the Atomic Energy Act of 1954, as amended provides authority for agency personnel to carry weapons in the line of duty. The Commission, however, has never exercised this authority. A copy of the section of the Act pertaining to this subject is enclosed.

Question B: **If your answer to question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?**

Answer: To date, the Commission has not exercised its authority in this regard.

Question C: **If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where Inspector General personnel may have been unnecessarily placed in danger as a result.**

Answer: There have been no instances of Office of the Inspector General (OIG) personnel being placed in danger by not carrying firearms in the execution of their duties. However, I should clarify that I only assumed my duties on December 3, 1989.

Question D: **What additional training and expenses would be included if firearms authority was provided to Inspector General personnel?**

Answer: OIG investigative personnel are already being sent to the Federal Enforcement Training Center. Part of the training program at this facility includes instruction in the use of firearms and the laws of arrest and search procedures. Investigators would subsequently be requalified semi-annually. The incurred cost in the above training and requalification would be minimal.

Question E: **What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)**

Answer: This office would establish a normal firearms policy patterned after other law enforcement agencies. The authority would not have special limits since risks and opportunities typically arise and pass suddenly. This kind of policy is consistent with agencies that currently possess such authority.

Question F: **It has been suggested that deputation as Assistant U.S. Marshals may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation.**

Answer: While I have not used DOJ's program for deputizing Assistant U.S. Marshals while at the NRC, I have had experience with the program during my tenure with the Labor Department's Office of Inspector General. It has been my experience that this program is an ineffective way to protect IG personnel who may encounter dangerous situations in the execution of their duties. First, the process was too slow to be responsive. Investigators often must react quickly to circumstances which could place them in danger. As a result, the DOJ deputation program was too cumbersome to provide the necessary support to meet the Office's mission needs. Also, I found the DOJ policy governing this program inconsistent and confusing.

Additional Comments:

I recently made a presentation to the National Advisory Commission on Law Enforcement (NACLE) on this subject. A copy of that presentation is enclosed.

Authority to Execute Search and Arrest Warrants

Question: **I am concerned about reports that audit and investigations are also impeded by the perceived or actual lack of authority to execute judicially approved search and arrest warrants. Should this power be given to inspector general personnel?**

Answer: I have had no experience with the impact of lack of authority to execute judicially approved search and arrest warrants during my short tenure at the NRC. My experience with the federal investigative community has shown me, however, that this authority is essential. The Department of Justice has in the past been reticent to allow IG agents to execute search warrants. When these warrants are executed with U.S. Marshalls or FBI agents, however, the IG case agent often must be the first agent through the door to prevent document destruction and to guide the team to areas where evidence is stored or hidden. This sometimes places IG agents at considerable risk. Also, at the time of an arrest, an IG case agent often must gain cooperation from all parties involved. To gain this cooperation, the agent must be viewed as a credible enforcement figure. If an IG agent is not able to present a warrant during an arrest, this credibility may not be forthcoming in the above situations.

Protection Services

Question: I would appreciate receiving a complete description of protective services, if any, furnished by I.G. personnel for the head of your agency during the past 5 years, including some estimate of the personnel years expended on this purpose, and the authority for providing such services.

Answer: Since this Office was created in April 1989, no protective services have been provided to the NRC Chairman by OIG personnel.

DOJ Opinion on Limiting IG Investigative Activities

Question: **The Committee has heard testimony from a number of inspectors general concerning the limitations the Justice Department has sought to impose on I.G. audit and investigative activities in two memorandums issued by the Office of Legal Counsel (particularly "Kmiec I" dated March 9, 1989). Please provide the Committee with any comments you may have on the impact of these memorandums on your ability to complete your mission.**

Answer: Under the current organizational structure, the OIG only has authority for investigating allegations of wrongdoing by NRC employees and NRC contractors. The Office of Investigations (OI) which reports to the Executive Director for Operations is vested with the responsibility to investigate wrongdoing by individuals and organizations licensed by the Commission (e.g., utilities operating nuclear power plants and holders of material licenses). This split in investigative responsibilities has given rise to a number of blurred lines of jurisdictional authority. For example, in the initial stages of an investigation, involving a utility or nuclear material licensee it is often difficult to ascertain whether there is any negligence on the part of NRC personnel or whether NRC personnel have conspired with the licensees in the alleged wrongdoing. Secondly, jurisdiction is not clear between the OIG and OI on cases involving false statements made by licensee personnel or by such personnel on the basis of information provided by their contractors.

I believe that without clarification, the effectiveness of NRC's overall investigative program could be adversely affected. However, rather than provide guidance to sort out investigative jurisdiction questions within NRC, the March 9 DOJ opinion only further confuses the issue.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 6 1990

THE INSPECTOR GENERAL

Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This is in response to your letter of February 2, 1990 in which you asked for information concerning a series of vital law enforcement issues that impact on the capability of the Inspector General community to fulfill their legislated responsibilities.

I have enclosed an appendix which responds directly to the questions which you posed in your letter. The issue of providing law enforcement authority to the Inspector General community is of particular importance, since it affects the day to day operations of our criminal investigators in the field. The lack of full law enforcement authority for our special agents diminishes their full effectiveness as criminal investigators and creates potential safety problems. I would strongly support legislation that would correct this deficiency.

Should your staff have additional questions regarding this letter and its appendix, please contact John E. Barden, my Assistant Inspector General for Investigations at 382-4109.

Sincerely,

John C Martin

John C. Martin

Enclosure

Appendix to Senator John Glenn Letter on Law Enforcement Issues

The first area of concern from the February 2, 1990 letter of Senator John Glenn concerns the establishment of general law enforcement authorities for the Inspector General personnel.

A. Does your agency's governing statute permit I.G. personnel to carry weapons. If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.

Answer: No.

B. Not Applicable.

C. If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where inspector general personnel may have been unnecessarily placed in danger as a result.

Answer: In addition to the unnecessary exposure to danger of our agent personnel through the lack of firearms authority, the absence of full law enforcement authority also adversely impacts several other aspects of the OIG, EPA criminal investigative mission. The following list of events common to the criminal investigative function amply demonstrate that not only firearms authority, but the full range of law enforcement authority is necessary for OIG agents to effectively, efficiently and safely perform their responsibilities:

1. Dealing with known violent criminals
2. Locating and interviewing subjects and witnesses in unsafe areas
3. Service of subpoenas in unsafe areas
4. Undercover operations
5. Protection of witnesses
6. Use of consensual monitoring techniques
7. Make warrantless arrests
8. Prevent the loss or destruction of evidence
9. Execution of search and arrest warrants
10. Full participation in joint investigations with fully empowered law enforcement agencies
11. Detention of fugitives or subjects who admit to crimes during interviews
12. Obtaining records as a recognized law enforcement office

I have attached brief descriptions (Exhibit 1) of seven situations which occurred within the past year that exposed our OIG Special Agent personnel to potentially hazardous circumstances or required the use of other law enforcement personnel to carry out functions that our agents would have performed more efficiently and timely. I have also attached an additional six situations (Exhibit 2) which identify events occurring within the past year where the use of full law enforcement authority would have increased our agent effectiveness in performing and completing their criminal investigative duties.

D. What additional training and expenses would be included if firearms authority was provided inspector general personnel?

Answer: Additional training would be required to send approximately seven agents to the Federal Law Enforcement Training Center (FLETC), Glynco, GA for firearms instructor training. Also, all agent personnel would be required to qualify or requalify at local firing ranges to certify their proficiency in firing the agency issued service revolver.

Basic firearms instruction is already provided in the Basic Criminal Investigator School, at FLETC. All entry level agents currently receive instruction and practical exercises at FLETC in activities associated with the full law enforcement power such as judgmental firing, arrest techniques, execution of arrest and search warrants, raids and crime scene searches to name just a few. They must fully satisfy FLETC requirements in all these areas and others in order to successfully complete the Basic Criminal Investigator course. In addition the successful completion of the FLETC basic course is a mandatory requirement for continued employment by all entry level agents with the OIG EPA; their tenure is contingent upon their graduation from this course.

Additional expenses would come with the procurement of the agency issue service revolver, the holster and belt, ammunition pouches, speedloaders and handcuffs. The total cost to outfit all criminal investigator/agent personnel within the OIG EPA would be approximately $20,000. Another purchase which would require further consideration would be the purchase of a Body Protective Unit which would protect the wearer from small caliber bullets in the trunk area. The cost to purchase BPU's for all agents would be approximately $12,000.

Another recurring expense associated with the quarterly firearms qualifications would be the expenditure of ammunition, weapon cleaning supplies and maintenance. This would cost approximately $12,000 annually for all agent personnel.

Therefore, the total cost of initial purchase could total $32,000 and the annual recurring expense could cost another $12,000 for a 55 special agent force.

E. What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?

Answer: It is very difficult to provide specific guidance as to when a firearm should be worn within the environment in which our agents currently operate. An agent may encounter a dangerous situation under circumstances which normally would not have been classified hazardous. This is a matter which would best be left to the judgement of the agent and his supervisor under regulations approved by the Inspector General.

F. It has been suggested that deputation as Assistant U.S. Marshal's may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation. You may wish to consider the following issues:

1. What is the procedure for obtaining authorization for appointment as a Special Deputy U.S. Marshal for your personnel? Which officials within your agency or at the Department of Justice must approve such deputations?

Answer: All our requests for deputization follow the procedures established by the Department of Justice. Requests for deputation originate from our field supervisors. The Divisional Inspectors General for Investigations must send a written request to the Assistant Inspector General for Investigations. After the request is reviewed and found to be appropriate the letter request is signed by the Assistant Inspector General for Investigations. It then takes one of two different avenues in the approval process at the Justice Department. If the request for deputation is for a protective detail, the letter is directed to the Deputy Director, United States Marshals Service. On the other hand if the request for deputation relates to a hazardous investigation, the letter must be addressed to the Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice.

2. On average, how long does the process for reviewing requests for these appointments take?

Answer: The review process for obtaining approval of a deputation request is a time consuming exercise that can take as long as four months. This lengthy procedure can present a serious problem to the OIG, EPA if time is of the essence.

3. How many requests for deputation have you sent to the Department of Justice during the last year? How many have been denied? For what reason?

Answer: The Office of Investigations, OIG EPA sent seven requests for deputation during the past year and none were denied. Two of the seven requests were for a hazardous investigation and the remainder were for the protective detail.

4. Is there any avenue for reconsideration of denial of a request for deputation?

Answer: If the request was denied, the only other approach would be to develop additional information regarding the hazardous circumstances and to submit the request again.

5. I have been informed that "blanket" authorization was granted to criminal investigators of the Department of Interior for purposes of investigating Bureau of Indian Affairs matters. Under what circumstances are such "blanket" approvals granted? How many have been requested and how many have been granted since January 1, 1990?

Answer: "Blanket" authorization has never been utilized by the OIG EPA.

6. Are requests that agents be deputized ever denied by the Department of Justice even though they have been requested by the pertinent United States Attorney's Office? For what reason would the Department of Justice override the recommendations of an United States Attorney's Office.

Answer: This office has never experienced a denial of the nature suggested in question 6. Therefore, the question cannot be addressed.

7. How long does a Marshal's appointment last. What is the procedure for renewal of a deputation? How long does this process take?

Answer: All special deputations expire on each June 30th, unless an earlier date is specified. Requests for renewal must be in writing and must again include specific justification. The renewal requests should not take any longer than one to two weeks on average.

The second concern dealt with the actual or perceived lack of law enforcement authority impeding audit and investigative work.

Comment: There is an actual and direct impediment to OIG investigative work by not possessing full law enforcement authority. When OIG agents are not able to review essential criminal records maintained by state or local law enforcement authorities, this may cause a delay in the investigation or create a potential hazard to the investigator, if a criminal record on a witness or subject of an investigation is not available. Further, the inability to obtain and execute search or arrest warrants may create delays in an investigation that may potentially result in important evidence being hidden or destroyed or the target of the investigation escaping. Additionally witnesses or subjects may not be interviewed in a timely manner, if it is necessary to bring a fully empowered law enforcement officer to the interview when a dangerous situation is foreseen. There is no direct impediment to the audit function of the Office of Inspector General in not having law enforcement authority. Authority to carry firearms and execute warrants would not be necessary for audit personnel.

Your third concern addressed protective services.

Comment: The Security and Inspection Division (SID) of EPA first provided protective security for the Administrator of EPA during the mid-70's. This function along with all investigative and security responsibilities of SID was transferred to the Office of Inspector General, Section 9(a)(1) of the Inspector General Act of 1978, as amended. Currently, the authority to provide protective security measures for the Administrator is found in the EPA Manual on Functions and Activities of the Office of Inspector General (Chapter 1, Paragraph 5(a), of EPA Manual 6500, 1985 Edition).

During the past five years, the protective detail for the Administrator has been inactive. However, IG personnel have been assigned and have maintained their firearms qualifications in the event an immediate need to provide protective services to the Administrator should arise. We annually project approximately one-half staffyear to this function, but it has not been utilized.

The fourth issue on which you requested a response concerned the limitations the Justice Department sought to impose on Inspector General activities by way of DOJ's Office of Legal Counsel (OLC) memorandum of March 9, 1989.

Comment: As you may recall, part of my testimony before the committee on Governmental Affairs, U.S. Senate, on October 3, 1989 concerned the OLC opinion which narrowly interpreted the Inspectors General authority. As I pointed out during my testimony the OLC opinion is unnecessarily restrictive. It is my opinion that the legislative intent of the Inspector General Act did not limit the responsibility of the Office of Inspector General to allegations of fraud, waste or above among the agency's employees, contractors, grantees and other recipients of Federal funds. An important element of my duties as an Inspector General is to conduct investigations relating to all programs and operations of the U.S. Environmental Protection Agency. Therefore, I believe the recent OLC opinion has restricted the OIG's authority too narrowly, and it would unnecessarily preclude my office from performing its proper oversight role in eliminating fraud, waste and abuse in the Agency's programs.

EXHIBIT 1

SERVICE OF SUBPOENA IN UNSAFE AREAS

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Need for Full Law Enforcement Authority

Service of Subpoenas in Unsafe Areas

Location and Date of Event

New York City - Numerous occasions from January 1989 through May 1989.

Description of Event

The case involved the bribery of an EPA official by over 25 demolition and asbestos removal contractors. On several occasions the Assistant United States Attorney assigned the case requested the issuance of either grand jury or trial subpeonas on both individuals and companies whose locations were in areas in New York City that the AUSA identified as unsafe. On all of these occasions, the subpoenas were served by an agent from another agency who had authority to carry a fire arm.

Solution

If OIG Special Agents had Full Enforcement Authority, the subpoenas could have been served more timely and efficiently.

Agency File Number: 1-86-508, 1-86-514 and related cases.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Need For Full Law Enforcement Authority

Service of subpoenas in unsafe areas
Assaults on Special Agents

Location and Date of Event

Dallas, Texas - November 17, 1989

Description of Event

Unarmed OIG agent served a Federal grand jury subpoena on subject at his residence. Subject came to door while restraining a german shepard dog by the collar. Subject was clearly upset by the visit of the OIG agent and being served the subpoena. The agent had no way to defend himself if subject's dog would have attacked him.

Solution

OIG special agents need to be armed to protect themselves while conducting criminal investigations.

Agency File Number: 89-4007

LOCATING AND INTERVIEWING SUBJECTS IN UNSAFE AREAS

United States
Environmental Protection Agency
Office of Inspector General

Need for Full Law Enforcement Authority:

Locating and Interviewing Witnesses/Subjects in Unsafe Areas

Location and Date of Event:

Ongoing from 1988 to the present along the U.S./Mexican border in southern Texas

Description of Event:

A joint OIG EPA/FBI investigation is being conducted into allegations of bribes/gratuities being offered by an engineering firm to local officials along the Texas/Mexican border. This attempt at obtaining influence over the local officials is an effort to secure engineering contracts on several EPA-funded waste water treatment projects. This area is also the second largest port of entry for illicit drugs from South America. Due to the random presence of drug smugglers, some of whom are directly or indirectly involved in "white collar crime" matters, the FBI, DEA and related law enforcement agencies will not conduct interviews, serve subpoenas, etc., in these areas, which OIG EPA agents routinely work unarmed, unless they are armed for self defense.

Solution:

OIG special agents should be armed for self defense when conducting investigations in areas clearly known to be populated with drug smugglers and dealers, many of whom are local residents involved in "legitimate" enterprises which are of investigative interest to the OIG EPA.

Agency File Number:

87-4060

UNITED STATED ENVIRONMENTAL
PROTECTION AGENCY

Need For Full Law Enforcement Authority:

Locating and interviewing subjects and /or witnesses in unsafe area.

Location and Date of Event:

Newark, NJ. on various dates.

Description of Event:

In a case involving alleged false laboratory reports submitted to EPA, several subjects/witnesses have been interviewed during the night hours in areas of Newark, New Jersey that would be considered dangerous. The areas are not always receptive to "official looking" individuals. In addition, the nature of the case does not always allow the Special Agent to determine in advance if he/she is interviewing a subject or a witness.

Solution:

If OIG Special Agents had the authority to carry weapons, they could perform their duties knowing they have the training and ability to protect themselves and others from bodily harm.

Agency File Number:

#89-6015

U. S. Environmental Protection Agency
Office of Inspector General

Need for Full Enforcement Authority

Locating and interviewing witnesses in unsafe areas.

Location and Date of Event

Alexandria, VA - August 15, 1989

Description of Event

In a case involving the theft of an undetermined amount of telecommunications equipment, an OIG special agent conducted a surveillance of one of the subject's residences. The surveillance was conducted in order to verify the subject's address and to obtain any plain-view evidence available. In view of the fact that several witnesses have received threatening phone calls concerning their participation in the investigation of this matter, and the fact that the witnesses believe that the individual in question was responsible for those threats, the OIG agent placed himself in a potentially dangerous situation by conducting the surveillance of the subject's residence.

Solution

If OIG special agents had full law enforcement authority, including the authority to properly protect themselves, situations such as the one described above would not interfere with the agents' ability to successfully investigate criminal allegations.

Agency File Number: 89-2047

DEALINGS WITH KNOWN VIOLENT CRIMINALS

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Need For Full Law Enforcement Authority

Dealing With Known Violent Criminals

Location and Date of Event

New York City - Numerous occasions from January 1989 through May 1989

Description of Event

In a case involving the bribery of an EPA official by over 25 demolition and asbestos removal contractors, the investigation revealed that several of the subject contractors had ties to Organized Crime. The investigation also revealed that a "death threat" had been made against the government's prime witness, necessitating that he be placed in the Witness Protection Program. The Assistant United States Attorney assigned this joint investigation decided that all contacts with suspected Organized Crime individuals be conducted by agents with authority to carry a fire arm when available.

Solution

If OIG Special Agents had Full Enforcement Authority, OIG participation in this investigation would have been maximized and the investigation would have been worked more efficiently.

Agency File Number: 1-86-508, 1-86-514 and related cases.

United States
Environmental Protection Agency
Office of Inspector General

Need for Full Law Enforcement Authority

Dealings with Known Violent Criminals

Location and Date of Event

Events have yet to occur

Description of Event

Criminal records checks of witnesses to a possible fraud committed relating to an EPA-funded contract disclosed that 10 of 14 had criminal records. Two have been arrested over 40 times each for various crimes, including assault and battery on a police officer, and weapons and drug charges. Three have outstanding arrest warrants for motor vehicle offenses. As they are witnesses in the case, these individuals will have to be located and interviewed.

Solution

If OIG agents had authority to carry firearms and make arrests, the potential harm to which the interviewing agents will be exposed would be significantly reduced.

Agency File Number: 89-1017

EXHIBIT 2

FULL PARTICIPATION IN A JOINT INVESTIGATION

United States
Environmental Protection Agency
Office of Inspector General

Need for Full Law Enforcement Authority:

Full Participation in a Joint Investigation

Location and Date of Event:

October 1989 to present

Description of Event:

The OIG EPA entered into a joint investigation with the New Hampshire State Police and Fire Marshall and the Bureau of Alcohol, Tobacco & Firearms concerning a possible arson conspiracy relating to a fire at an illegal tire dump. EPA emergency response efforts, potentially costing $1.4 million, were needed to quell the fire. The chief suspect was the owner of the dump who was already a fugitive from a New Hampshire state indictment. The special agents from the OIG conducted many interviews in order to develop information concerning the location of the fugitive. If the OIG agents had developed information concerning the fugitive's whereabouts, or if they physically had found the fugitive during their investigation, they would not have been able to follow through on their information. This information would have been turned over to the New Hampshire State Police who would have made the arrest. Also, if through their efforts they physically located the fugitive while conducting interviews, they would not have been able to detain the fugitive. The safety of cur agents would also have been risked, if the fugitive decided to commit a violent act against them.

Solution:

With full law enforcement authority, the OIG could expect to act as a more effective member of the investigative team.

Agency File Number:

90-1004

UNABLE TO OBTAIN RECORDS
AS NOT RECOGNIZED
AS LAW ENFORCEMENT OFFICER

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Need For Full Law Enforcement Authority

Obtaining Records as a Recognized Law Enforcement Office

Location and Date of Event

Dallas, Texas - September 1989

Description of Event

OIG agent attempted to conduct records check on subject at the Dallas Police Department but was told his agency was not on the list of authorized law enforcement agencies.

Solution

OIG special agents need to be recognized by state and local law enforcement agencies as having full law enforcement authority in order to conduct criminal investigations.

Agency File Number: 89-4007

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Need For Full Law Enforcement Authority
Obtaining Records as a Recognized Law Enforcement Office

Location and Date of Event
Raleigh, North Carolina

Description of Event

An attempt was made by two EPA/OIG Special Agents to obtain law enforcement records on individuals in North Carolina. The request was made to the North Carolina State Police who denied the request because EPA/OIG does not have full law enforcement authority.

Solution

Full law enforcement authority would have allowed the EPA/OIG agents to obtain the required records.

Agency File Number 88-4003

U. S. Environmental Protection Agency
Office of Inspector General

Need for Full Enforcement Authority

Unable to obtain records as not recognized as law enforcement officer.

Location and Date of Event

Fairfax Station, VA - April 21, 1989

Description of Event

In a case involving unauthorized access of a government database, OIG special agents attempted to obtain information from the telephone company as to the identity of the hacker by way of telephone records. Officials from the telephone company refused to disclose the information to the OIG agents because the OIG is not a recognized law enforcement authority. Although the data was eventually obtained through an alternate source, this caused a delay in obtaining a search warrant and may have allowed for continued access of the EPA database and the destruction of evidence. Further, because the agents lacked recognition as law enforcement officers, they were unable to obtain criminal history information on the suspects, thus, placing themselves in the dangerous position of serving search warrant at night in an unfamiliar remote location, with only two U.S. Marshals to protect them (as OIG agents are not authorized to carry firearms), and with no knowledge of the suspects' prior criminal acts.

Solution

If the OIG agents possessed full law enforcement authority, the telephone company would have recognized the OIG as a law enforcement agency and the critical telephone record information would have been obtained in a more timely manner. Additionally, if other law enforcement agencies recognized OIG agents as law enforcement officers, access to criminal histories would not be limited and agents could take precautions to protect themselves. Furthermore, the authority to carry firearms during such potentially dangerous activities as the execution of a search warrant would permit OIG agents to protect themselves and others.

Agency File Number: 89-2030

EXECUTE SEARCH WARRANT

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Need For Full Law Enforcement Authority

Execute Search Warrant

Location and Date of Event

Nanco Laboratory, Wappinger Falls, NY- August 3, 1989

Description of Event

The case involved Nanco Laboratory, a firm participating in the US EPA Contract Laboratory Program, (CLP). This office had probable cause to believe that evidence of fraud was concealed on the premises of Nanco Laboratories. A Search Warrant was obtained and was executed with the assistance of eight Postal Inspectors. Without the assistance of the Postal Inspectors, the warrant could not have been carried out.

Solution

If OIG Special Agents had Full Law Enforcement Authority, the assistance provided by the Postal Inspectors would not have been necessary.

Agency File Number: 89-1036

EXECUTE ARREST WARRANT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
OFFICE OF INSPECTOR GENERAL

Need For Full Law Enforcement Authority

Execute arrest warrant

Location and Date of Event

Washington, DC - October 4, 1989

Description of Event

In a case involving falsified time cards and theft of leave, an arrest warrant was issued for the subject. However, no other law enforcement agency was available to execute the warrant. After negotiation with the Metropolitan Police, it was determined that an officer would arrest the subject, if the subject appeared at the office at 8:00 a.m. After being notified of the existing arrest warrant, the subject agreed to accompany the Agent and self surrender to the Metropolitan Police.

Solution

If OIG agents had arrest authority, lengthy negotiations would not be needed. Further, if the subject had not self surrendered, no one was available to make the arrest.

Federal Emergency Management Agency
Washington, D.C. 20472

FEB 27 1990

The Honorable John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, D. C. 20510-6250

Dear Mr. Chairman:

The following is in response to your letter of inquiry dated February 2, 1990 concerning the duties, powers, and vulnerabilities of criminal investigative personnel assigned to the Office of Inspector General (OIG), Federal Emergency Management Agency (FEMA).

Before responding to your questions, I would like to provide you with general background information on our office. The Office of Inspector General, FEMA, was established administratively at the time of the Agency's creation in 1979. Although not established by law, the OIG was formed and designed to operate in accordance with the intent and purpose of the Inspector General Act of 1978, which established most of the statutory Inspectors General. On October 18, 1988 President Reagan signed into law the Inspector General Act Amendments of 1988, Public Law 100-504, creating a statutory Inspector General (IG) in FEMA.

Since 1979, the Criminal Investigators (Special Agents) assigned to this office have conducted investigations, developed evidence, and, in general, performed the duties that are common to all Special Agents employed by the statutory Inspectors General. Our response to your inquiry is based on the activities of the FEMA OIG agents since the inception of this office.

In response to your questions, we have prepared answers which conform to the format outlined in your letter. The answers are as follows:

A. This Agency's governing statutes do not permit IG personnel to carry weapons.

B. Not applicable.

C. Lack of authority to carry firearms (and to perform normal law enforcement functions) has, on occasion, created possible danger to personnel of this office. This has caused investigative personnel to delay investigative action and seek other means to perform normal investigative functions.

The investigative jurisdiction of FEMA extends from the Commonwealth of the Northern Mariana Islands in the Western Pacific to the Island of St. Croix in the Eastern Atlantic, as well as the Continental United States, Hawaii, and Alaska. The assigned Special Agents are, for the most part, performing their investigative function alone and at great distance from the Headquarters Office of the Inspector General in Washington, D. C. There have been times when arrangements to acquire support from local police or other Federal agencies have required such extensive coordination and negotiation that it has adversely affected the completion of investigations. This would not be the case if individual agents had law enforcement authority and the authority to carry firearms.

Moreover, there is a reluctancy by law enforcement personnel (state, local and Federal) to accompany or to be perceived as merely protective back-up for a Special Agent who is otherwise unarmed and unable to protect themselves should a dangerous situation occur.

In the past, there have been several instances where Special Agents have been placed in a threatening situation because of the nature of the work they do. Examples are as follows:

1. In early 1988, two FEMA Special Agents were conducting a surveillance of flood damaged properties in the Mississippi Delta in order to determine whether repeated claims on these properties had been fraudulently submitted to the Agency's National Flood Insurance Program Office. While traveling in a rural and sparsely occupied area, their vehicle was trailed and forced to the side of the road by armed individuals who had indicated that "snooping" into the flood insurance practices in that area was dangerous business.

2. FEMA Special Agents assigned to the investigation of fraudulent claims in Puerto Rico were advised by the Puerto Rican Commonwealth Police Department that they were entering communities to interview witnesses and to conduct investigations where the Puerto Rican Police themselves feared for their own safety. In those communities, most residents were reportedly related, unemployed and involved in illegal activity, i.e., drugs, prostitution, and trafficking in stolen property.

3. In late 1988, two FEMA Special Agents were conducting an all night surveillance in a high crime area of Brooklyn, New York. After coordination with the local police precinct, they were supplied with body armor and

a police radio and were strongly advised to be extremely wary of persons in the area who might perceive them to be police officers or narcotic agents. They were also advised that the local police would make extra patrols in their area, however, sufficient manpower could not be provided to give them complete coverage.

4. In another situation, a FEMA OIG Special Agent who was conducting a joint investigation with members of the Fire Marshall's staff of Houston, Texas was advised by the assigned Arson Investigator that, because she was unarmed, she should not enter the building and conduct joint interviews with the Fire Marshall, whom she was accompanying. The reason given by the Fire Marshall was that the buildings in which they were conducting the investigation were particularly dangerous.

D. Firearms qualification training would cost FEMA's Office of Inspector General approximately four workdays per year for each Special Agent. Additional expenses would be incurred for the purchase of the firearms and ammunition, and the necessary equipment to store and repair the firearms. We anticipate our first year costs to be approximately $20,000.

E. If the investigators were empowered with full law enforcement authority, the limitations on the use of firearms would be at the discretion of the Inspector General. The extent of the limitations would depend on the circumstances surrounding the assignment. Firearms would not be worn during office duty or while off duty.

F. The FEMA Office of Inspector General has not made any application for Special Deputy Marshall status. However, based on information we received from other Offices of Inspector General, Special Deputy Marshall status takes anywhere between two weeks to two months to acquire.

In response to your final questions, we offer these comments:

o Inspector General personnel should be empowered to obtain, serve, and execute search warrants under the provisions of the U. S. Code; this would expedite and make more efficient the investigative process.

o FEMA OIG has not furnished protective services to the head of the Agency or any other personnel during the last five years;

o We do not believe that memoranda issued by the U. S. Department of Justice, which has sought to limit the authority of certain Inspectors General would adversely impact on our ability to accomplish our mission.

We appreciate the opportunity to respond to the questions you have posed. Should your staff have any questions concerning our response, please have them contact me or Francis G. McGrath, Assistant Inspector General for Investigations, at 646-3895.

Sincerely,

Gary Barard

Gary J. Barard
Acting Deputy Inspector General

General Services Administration
Office of Inspector General
Washington, DC 20405

MAR 12 1990

The Honorable
John Glenn
Chairman, Committee on
Governmental Affairs
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am responding to your letter of February 2, 1990 in which you pose questions about firearms authority for Inspector General (IG) agents, and the authority for such agents to serve search and arrest warrants. You also requested my views about the effects of two Office of Legal Counsel (OLC) opinions on investigative and audit operations. Enclosure 1 contains my point by point response to your questions.

As you can see from my responses in enclosure 1, my Office presently is not affected by the issue of full law enforcement authority for IG agents. Through Agency statutes, our special agents have been delegated firearms and arrest authority which, although more limited than I would prefer, has been adequate to meet most of our investigative needs. Nonetheless, I am not wholly comfortable with this situation. This authority has been given to us by our Agency. To the extent that it has been given, it could be taken back at any time by the Agency. This places us in a situation where we are dependent on the Agency for basic investigative tools that should be provided by statute.

Congress has seen the need to grant the IGs other authorities to assure their continued independence. Most of us have access to independent legal counsel and personnel support. We maintain our own budgets, and issue our own subpoenas. Given this, it is inconsistent with such independence to have to seek law enforcement authority from our agencies. Moreover, given its value to the conduct of IG investigations, it is unreasonable to deny this authority entirely to those OIGs whose agencies do not have any law enforcement policy to delegate.

Speaking then as an IG who already enjoys the benefits of law enforcement authority, I urge Congress to provide this authority to all OIGs desiring it. S. 2080, which was recently introduced by Senator Boschwitz, would be an excellent mechanism to provide this authority. One of the significant features of this bill is

that it allows each IG the freedom to determine the degree of law enforcement authority he or she believes appropriate for his or her organization. Thus, those of us who see the need for full law enforcement authority could acquire it through the promulgation of regulations; those of us who desire a lesser degree of authority--perhaps the authority to carry firearms for personal protection but not arrest authority--could simply so indicate in the regulations that we promulgate. Finally, those IGs who may not see the need for law enforcement authority would be free not to seek it. Given this freedom of choice, I could not envision any of my colleagues opposing this bill. In short, it is an excellent piece of legislation which I urge you to support.
The OLC opinions in question have not had any direct effect on either our audit or investigative operations. Nonetheless, they do trouble me as they are widely perceived as a challenge to the independence and authority of the IGs. Therefore, I believe that Congress needs to clarify the confusion engendered by these opinions. As with the matter of full law enforcement authority, I would be pleased to assist the Committee in such an effort.

Finally, there is one investigative tool we lack that is of paramount importance to us--the authority to issue subpoenas ad testificandum. As you know, IG subpoenas may be issued only for documents; they cannot be used to compel testimony. If we encounter a situation where a potential witness refuses to be interviewed, we have only two basic options. We can either forego the interview, or we can try to get a grand jury subpoena. If we are successful with the latter, we then find ourselves constrained by grand jury secrecy restrictions. In some instances, information gained through that process cannot be shared with our agency to the detriment of the civil and administrative processes.

I can think of no new authority of greater importance to us than this. Unless we resort to grand jury subpoenas, our investigations can be thwarted by companies or other entities under investigation by instructing their employees not to consent to interview. Investigations can be hindered by employees or other witnesses not wanting to provide information under non-compelled process. Even so-called voluntary interviews are frequently delayed while the witness's counsel fits us into his or her schedule at their convenience. Testimonial subpoena authority would alleviate all of these obstacles.

As testimony at your October 1989 hearings revealed, this authority is already possessed by a number of agencies which do not have a law enforcement mission. Thus, it would make sense to extend the same authority to the IG Community in view of our law enforcement responsibilities.

In closing, I appreciate the opportunity to provide my views on these topics of such great importance to the entire IG community. Please let me know if my staff or I could be of assistance to you or the Committee in obtaining these authorities.

Sincerely,

William R. Barton

William R. Barton
Inspector General

Enclosure

Enclosure 1

I. Does your agency's governing statute permit I.G. personnel to carry weapons. If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.

Section 5 of the Act of June 1, 1948 (40 U.S.C. 318d) provides authority for nonuniformed special policemen to carry firearms. (Enclosure A) These authorities were transferred from the Federal Works Agency to the General Services Administration by Section 103(a) of the Federal Property and Administrative Service Act of 1949 (40 U.S.C. 753) Through GSA Internal Directive ADM P 5450.39C CHGE 30 (Sept. 13, 1989), the Administrator of General Services has delegated to the Inspector General the authority to appoint officers and employees in the Office of Inspector General having investigatory functions as nonuniformed special policemen. (Enclosure B)

A. If your answer to question "I" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?

Our special agents receive basic firearms training during the Criminal Investigator's Course at the Federal Law Enforcement Training Center, the same course of instruction taken by all Federal Criminal investigators except the Federal Bureau of Investigation and Drug Enforcement Administration. Additionally, we have initiated our own firearms training and qualification program that must rank as one of the most rigorous and thorough within the IG Community, and is on par with or exceeds those of most of the traditional law enforcement agencies. As an example:

1) Our special agents qualify quarterly.

2) Our average scores for the course of fire exceed the qualifying scores of most agencies.

3) Our Firearms Program has been reviewed and certified by the Federal Law Enforcement Training Center.

I have attached a copy of our new firearms policy which is currently being implemented (Enclosure C).

Our special agents are subject to the same constraints as all federal agents regarding the carriage of firearms under special situations such as aboard aircraft. We have imposed additional restrictions as well. As reflected in the attached Firearms Policy, a validly trained and qualified special agent is authorized to carry a firearm (1) when on duty, and (2) when he or she perceives a need to be armed. GSA-OIG special agents are not authorized to carry firearms in a non-duty status.

Firearms authority is essential if we are to maintain the quality of our investigations at the level they traditionally have been. We could not perform our mission as well without it. Our special agents are criminal investigators who conduct criminal investigations. Investigations consist of much more than the unhurried review of documents in the comfort and safety of an office setting. Our special agents use the full range of investigative techniques appropriate to resolving their cases. As do their counterparts in the FBI or Secret Service, our special agents conduct surveillances, serve search warrants, make arrests, and conduct interviews of hostile witnesses or subjects in hazardous locations.

Clearly there is an element of risk to the personal safety of our special agents in many of these situations. Although our special agents are as courageous as those of the traditional investigative agencies, we expect such courage to be tempered by intelligence and common sense. They would be foolhardy indeed to be enthusiastic about undertaking dangerous activities without the means to protect themselves, i.e. the right to carry firearms. By the same token, I would be insensitive to their safety if I were to permit them to endanger themselves under these conditions. Thus, one predictable result of not having firearms authority would be for our special agents not to perform investigative steps under conditions where they discern the need to be armed. This would degrade our capability to conduct thorough, professional criminal investigations. In sum, for the reasons stated above, I believe firearms authority is essential for us to carry out our mission.

B. **If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where inspector general personnel may have been unnecessarily placed in danger as a result.**

This is not applicable to the General Services Administration (GSA).

C. **What additional training and expenses would be included if firearms authority was provided inspector general personnel?**

As we already have this authority, we would incur no additional expenses. It might be useful to the Committee to be aware of the costs for our firearms program. As all IG investigators receive firearms training at the Federal Law Enforcement Training Center, the only additional training time is that used for quarterly familiarization and qualification. This amounts to about 16 hours per agent per year. Additionally, all of our field offices have certified firearms instructors who receive additional formal training. The additional number of hours of training for firearms instructors and program oversight by Central Office totals about 200 hours per annum.

Acquisition costs for our weapons were minimal as they were obtained by transfer from another agency. As several traditional law enforcement agencies continue to replace their service revolvers with semi-automatic pistols, surplus weapons should be available for transfer to OIGs at little or no cost. Ammunition costs for us are about $6000 per annum. This is about $60.00 per special agent.

D. **What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)**

As I have noted in I A, supra, our policy is to allow validly trained and qualified special agents who are on duty to determine when to carry firearms. This is a recent change from our previous policy of requiring supervisory approval. This change resulted from our experience over the past decade. We have not had any accidents or incidents involving the improper use of a firearm by any GSA-OIG special agent. Moreover, we now recognize that our special agents possess the requisite training and judgement to determine when the carriage of firearms is appropriate. We believe the interposition of a supervisor's judgement would add little to weapons safety, and conversely, could subject the special agent to unwarranted risk.

I have also pointed out that we do not normally permit the carriage of firearms in a non-duty status. This is appropriate for this OIG because of the nature of our work and the somewhat narrow scope of the statute granting us this authority. Therefore, I would suggest that each IG have sufficient latitude to decide whether to permit or require the carriage of firearms in a non-duty status as the operations of some OIGs may subject their agents to threats or hazards which we have not encountered.

E. It has been suggested that deputation as Assistant U.S. Marshal's may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation. You may wish to consider the following issues.

1. What is the procedure for obtaining authorization for appointment as a Special Deputy U.S. Marshal for your personnel? Which officials within your agency or at the Department of Justice must approve such deputations?

2. On average, how long does the process for reviewing requests for these appointments take?

3. How many requests for deputation have you sent to the Department of Justice during the last year? How many have been denied? For what reasons?

4. Is there any avenue for reconsideration of denial of a request for deputation?

5. I have been informed that "blanket authorization was granted to criminal investigators of the Department of Interior for purposes of investigating Bureau of Indian Affairs matters. Under what circumstances are such "blanket" approvals granted? How many have been requested and how many have been granted since January 1, 1990?

6. Are requests that agents be deputized ever denied by the Department of Justice even though they have been requested by the pertinent United States Attorney's Office? For what reason would the Department of Justice override the recommendation of an United States Attorney's Office?

7. How long does a Marshal's appointment last? What is the procedure for renewal of a deputation? How long does this process take?

   This is not applicable to GSA.

II. Second, I am concerned about reports that audit and investigations are also impeded by the perceived or actual lack of authority to execute judicially approved search and arrest warrants. Should this power be given to inspector general personnel?

Our special agents have authority to make application for and serve search warrants. There is some ambiguity about arrest warrants. Our special agents can make arrests without warrants, but it is not clear that we can execute arrest warrants. It appears anomalous to be able to arrest without a warrant, but not with a warrant. I believe we need appropriate legislation to give this authority not only to GSA-OIG special agents, but to all IG agents who require such authority in the course of their investigations.

III. **Third, I would appreciate receiving a complete description of protective services, if any, furnished by I.G. personnel for the head of your agency during the past 5 years, including some estimate of the personnel years expended on this purpose, and the authority for providing such services.**

Our special agents do not now perform any protective services for the GSA Administrator, nor have we over the past 5 years.

IV. **Fourth, the Committee has heard testimony from a number of inspectors general concerning the limitations the Justice Department has sought to impose on I.G. audit and investigative activities in two memorandums issued by the Office of Legal Counsel (particularly "Kmiec I" dated March 9, 1989). Please provide the Committee with any comments you may have on the impact of these memorandums on your ability to complete your mission.**

The two Office of Legal Counsel opinions to which you refer have not had any discernable impact on the audit or investigative operations of this Office.

NASA
National Aeronautics and
Space Administration
Washington, D.C.
20546

MAR 7 1990

Reply to Attn of: Office of Inspector General

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Senator Glenn:

In response to your letter dated February 2, 1990, requesting information and answers to questions regarding general law enforcement authority for the Inspectors General, may I assure you that I share your concern for the well-being of criminal investigators. Currently, they lack sufficient personal protection when subjected to unsafe and potentially dangerous situations while performing their assigned duties. The National Aeronautics and Space Administration's (NASA's) criminal investigators are not only unable to protect themselves, but are also hindered in safeguarding their witnesses and other individuals assisting during the conduct of investigations.

The lack of full law enforcement authority inhibits the ability of NASA Office of Inspector General (OIG) criminal investigators to fully execute their duties and responsibilities. As you noted, OIG investigative agents use the same position description as agents of other traditional Federal law enforcement agencies. However, OIG investigators do not possess full law enforcement authority. Despite this lack of full law enforcement authority, NASA OIG criminal investigators continue to successfully investigate complex criminal and drug-related investigations. These complex and potentially dangerous investigations require extensive liaison and time-consuming coordination efforts with other fully empowered law enforcement agencies.

Although NASA OIG criminal investigators have received the same training as those with the more traditional law enforcement agencies, they are not afforded the opportunity to obtain search warrants, protect witnesses, make arrests or carry firearms. It is inappropriate and unreasonable to deny NASA OIG criminal investigators the same law enforcement authorities as those available to criminal investigators of some Federal agencies, particularly when both work criminal investigations.

The following is a summary of the answers to the questions raised in your letter:

A. Q. Does your agency's governing statute permit I.G. personnel to carry weapons? If your answer is yes, please specify and attach a copy of the statute, agency directive, or other description of authority.

A. The National Aeronautics and Space Act of 1958, Public Law 85-568, at Section 304(e), 42 U.S.C. 2456 (copy enclosed) authorizes the Administrator to delegate the authority to carry firearms while performing official duties to employees of the agency. However, there is some case law affecting the Inspectors General which could raise a legal question as to the validity of a delegation. In addition, the statute is silent on the use of deadly force and on the power to arrest and serve process, etc. Only a statutory granting of full law enforcement authority would truly address the needs of my office.

B. Q. If your answer to Question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?

A. I have not sought firearms authority under the Space Act. I believe that full law enforcement authority, not just firearms authority, is essential to carrying out the OIG mission. I have continued to support the efforts of other Inspectors General through the President's Council on Integrity and Efficiency (PCIE) to obtain law enforcement authority.

C. Q. If you lack such firearms authority, please describe any problems this has caused in performing your mission. Please provide any specific instances where inspector general personnel may have been unnecessarily placed in danger as a result.

A. NASA criminal investigators have encountered numerous dangerous situations. The nature and scope of NASA OIG criminal investigations place our agents in potentially dangerous situations daily. The following are just three situations which clearly delineate the need for full law enforcement authority in the performance of its job:

(1) During an investigation involving contract fraud by a security company, a NASA prime

contractor, an OIG criminal investigator was required to enter the contractor's premises to review records. Several contractor employees were present at the time and made comments attesting to the fact that they were armed. Because the contractor was located in a small, rural town, no other Federal law enforcement assistance was readily available, and the NASA OIG employee incurred risk of possible physical harm to obtain the documentation.

Additionally, a confidential informant had notified the OIG criminal investigator that the contractor was hiding records, would attempt to deceive him as to the facts, and had stated that he had no intention of turning over all the records. Even though the Assistant U.S. Attorney believed that probable cause existed to obtain a search warrant, one was not obtained due to the fact there were no Federal agents sufficiently near to assist in its execution. Consequently, the contractor was served with an OIG subpoena, enforcement of which required nine months and several hundred staff hours of effort to enforce.

(2) During a product substitution investigation involving aerospace fasteners, an OIG criminal investigator was required to request an armed escort by an employee of another law enforcement agency in order to serve subpoenas at night in a known high crime area of a major city. This resulted in overtime being incurred by another agency for the sole purpose of escorting the NASA OIG investigator. The armed escort was not available for a second trip into the area, and the NASA OIG had to forego conducting crucial interviews.

The Assistant U.S. Attorney assigned to the investigation advised that a search warrant should be obtained and executed on the premises of the company under investigation. However, such action could not be taken because the case was near statute expiration, and insufficient time existed to arrange for the support of another Federal law enforcement agency. A delay of work on the case in order to find an agency willing to support the search warrant would have jeopardized the case.

(3) Another NASA OIG investigation concerned allegations that a NASA prime contractor had provided worthless individual surety and

performance bonds. The Affidavit of Individual Surety and Certificate of Sufficiency submitted in support of the bonds contained false and fraudulent identification of assets.

During the investigation, a search warrant was obtained and documents seized which attested to the true value and ownership of the assets described in the Affidavit and Certificate. The search warrant was obtained at the request of an Assistant U.S. Attorney. However, its preparation and execution required the NASA OIG to seek the assistance of the U.S. Marshal's Office. The U.S. Marshal's Office agreed to provide support for only as long as that office had no pending priority assignments. The NASA OIG was subsequently able to schedule the execution of the search warrant according to the availability of a U. S. Marshal's Office employee. Fortunately, the employee did not have any other pressing assignment at that time.

A secondary problem may come at the time of trial when the employee of the U. S. Marshal's Office will be needed to introduce into evidence the documents seized during the execution of the search warrant. The employee will have to travel to another judicial district where trial will be held in order to testify as to the chain of custody of the evidence seized. This could present a hardship to the U.S. Marshal's Office, and will again require extensive coordination efforts.

D. Q. What additional training and expenses would be included if firearms authority was provided inspector general personnel?

A. To implement firearms authority, NASA OIG Special Agents would be required to qualify every four months using their assigned firearm. This would mean the purchase of approximately 40 weapons, holsters and handcuffs, as well as sufficient ammunition to support the qualification requirements and to provide service ammunition for the weapons. It is estimated that one-time costs would be $14,000 with a recurring annual cost of $5,500.

E. Q. What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)

A. Enclosed is a copy of an excerpt from our OIG office manual regarding deputation and firearms, IGM 9820.8.

F. Q. It has been suggested that the deputation as Assistant U.S. Marshal's may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation.

A. We are formulating our first request for Special U.S. Marshal deputation in our fastener investigations. As such, we do not have the requisite experience to adequately address the issues you present concerning deputation.

The granting of full law enforcement authority, including the authority to obtain and execute search and arrest warrants, along with authority to carry firearms, to Inspector General personnel is essential for the effective pursuit of our mission. It is an inefficient and ineffective use of scarce investigative resources and wasteful of the taxpayers dollars to require two agencies to obtain and execute search and arrest warrants when one can do those things alone if it possessed full law enforcement authority.

NASA criminal investigators currently develop the probable cause for affidavits in support of search warrants, but then must obtain assistance from a full law enforcement empowered agency to obtain and execute the warrant. This arrangement is cumbersome, costly, and fraught with coordination difficulties. Not only are NASA's criminal investigators trained in obtaining search warrants, many are experienced in their execution, having done so in previous assignments with full law enforcement empowered agencies.

The NASA OIG does not provide protective services to senior NASA management.

The limitations contained in the legal memoranda of the Justice Department's Office of Legal Counsel (particularly "Kmiec I," dated March 9, 1989), have not impacted the ability of the NASA OIG to accomplish its mission. Since NASA does not perform regulatory type investigations, the "Kmiec" opinion has not had any impact on our operations. If impacted, we would limit the opinion to its facts and work cooperatively with agency management to ensure that functions are adequately investigated.

I fully support full law enforcement authority for NASA OIG criminal investigators. They are doing an excellent job without it under the circumstances, but could be much more effective with it. I stand ready in any way that I can to assist your committee in its deliberation regarding full law enforcement authority for Offices of Inspectors General.

If I can be of any further assistance, do not hesitate to contact me.

Sincerely,

Bill D. Colvin

Bill D. Colvin
Inspector General

Enclosures

Library References

War and National Defense ⚿38.	C.J.S. War and National Defense § 46.

Code of Federal Regulations

Extraterrestial exposure, powers of Administration relating to, see 14 CFR 1211.100 et seq.
Inspection of persons and personal effects, see 14 CFR 1204.1000 to 1204.1003.
Security classification program, see 14 CFR 1203.100 et seq.

§ 2456. Permission to use firearms

The Administrator may direct such of the officers and employees of the Administration as he deems necessary in the public interest to carry firearms while in the conduct of their official duties. The Administrator may also authorize such of those employees of the contractors and subcontractors of the Administration engaged in the protection of property owned by the United States and located at facilities owned by or contracted to the United States as he deems necessary in the public interest, to carry firearms while in the conduct of their official duties.

Pub.L. 85–568, Title III, § 304(e), July 29, 1958, 72 Stat. 435.

Historical Note

Codification. Section constitutes subsec. (e) of section 304 of Pub.L. 85–568. Subsecs. (a) and (b) of section 304 are classified to section 2455 of this title. Subsecs. (c) and (d) of section 304 are classified to sections 799 and 1114, respectively, of Title 18, Crimes and Criminal Procedure.

Legislative History. For legislative history and purpose of Pub.L. 85–568, see 1958 U.S.Code Cong. and Adm.News, p. 3160.

Code of Federal Regulations

Extraterrestial exposure, powers of Administration relating to, see 14 CFR 1211.100 et seq.

§ 2457. Property rights in inventions—Exclusive property of United States; issuance of patent

(a) Whenever any invention is made in the performance of any work under any contract of the Administration, and the Administrator determines that—

(1) the person who made the invention was employed or assigned to perform research, development, or exploration work and the invention is related to the work he was employed or assigned to perform, or that it was within the scope of his employment duties, whether or not it was made during working hours, or with a contribution by the Government of the use of Government facilities, equipment, materials, allocated funds, in-

UNITED STATES
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

OFFICE OF THE INSPECTOR GENERAL

In Reply Refer to: Your Reference:

MAR - 1 1990

Honorable John Glenn
Chairman, Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Senator Glenn:

This is in response to your letter of February 2, 1990, in which you posed a number of questions regarding the extension of law enforcement authorities to Federal inspector general personnel and other issues pertaining to Office of Inspector General operations.

Our organization became a statutory Office of Inspector General on April 16, 1989, under the provisions of the Inspector General Act Amendments of 1988. Although an administratively-empowered Office of Inspector General had performed audit functions for the Office of Personnel Management since the inception of OPM in 1979, there was no equivalent predecessor entity within the agency which held criminal investigative authority. Thus, our responses to many points of your inquiry necessarily reflect a sharply limited range of experience in the field of investigations. Our jurisdiction, however, encompasses such activities as the Federal Employees Health Benefits Program, Federal Employees Group Life Insurance, the Civil Service Retirement System, and the Federal Employees Retirement System, which collectively serve an estimated 8 million persons worldwide and will pay out nearly $50 billion in FY 1991. Hence, it is vital that, as our investigative function grows, we will have both the tangible resources and appropriate legal authorities to identify and aggressively pursue fraud throughout these OPM-administered programs.

Our specific responses are provided below, grouped by the major issue areas identified in your correspondence.

FIREARMS

A. OPM's organic legislation does not provide authority for any of the agency's employees, including OIG personnel, to carry weapons.

B. Not applicable.

C. To date, in the "startup" phase of our criminal investigations program, OIG staff have not encountered problems due to the lack of firearms authority.

D. All OIG/OPM special agents receive criminal investigator training at the Federal Law Enforcement Training Center in Glynco, GA. To complete this curriculum successfully, students must meet firearms qualifications standards set by the Department of the Treasury. Therefore, we would anticipate that minimal additional training and expenses, principally associated with obtaining weapons and maintaining the staff's qualifications, would be required if OIG/OPM were to receive firearms authority.

E. We believe that, if firearms authority is to be extended by statute to inspector general investigative staff government-wide, the relevant legislation should provide clear and specific guidelines for the establishment of agency policies regarding their control and usage. We would favor an approach which addresses both the need of OIG special agents to protect themselves in hazardous situations, whether anticipated or not, and the public's safety interests arising from the presence of armed law enforcement personnel who will have extensive contacts in the community at large on a daily basis.

F. To date, OIG/OPM has had no experience with deputation of its personnel through the U.S. Marshals Service.

SEARCH AND ARREST WARRANTS

While OIG/OPM personnel have not had cause to seek a search or arrest warrant as of this time, we anticipate that such needs will occur as our criminal investigations workload expands. We believe that providing the power to execute judicial warrants is an appropriate and reasonable corollary to the proposed extension of other law enforcement authorities to the Offices of Inspector General.

PROTECTIVE SERVICES

OIG/OPM has never performed protective services for the OPM Director, and we are unaware of the existence of any regulatory or statutory authority which would permit us to do so.

KMIEC OPINION

The mission and functions of the Office of Personnel Management are such that the subjects of virtually all of OIG's foreseeable investigative workload are likely to meet at least one of the three criteria enumerated in the *Kmiec* opinion (Federal employee, contractor, or recipient of Federal funds) as appropriate grounds for assertion of investigative jurisdiction by an Office of Inspector General. Therefore, we do not believe that the opinion, as currently interpreted by the Department of Justice, presents an impediment to accomplishment of our mission.

We appreciate this opportunity to express our views on issues of substantial interest throughout the Federal inspector general community. Please do not hesitate to contact us again if we may provide further information.

Sincerely,

Patrick J Conklin

Patrick J. Conklin
Inspector General

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OFFICE OF INSPECTOR GENERAL
844 RUSH STREET
CHICAGO, ILLINOIS 60611

RAILROAD RETIREMENT BOARD

March 8, 1990

The Honorable John Glenn
United States Senate
Chairman, Committee on Governmental Affairs
Washington, D.C. 20510-6250

Dear Senator Glenn:

I am pleased to respond to your inquiry of February 2, 1990, regarding the extension of general law enforcement and firearms authority to Special Agents in the Offices of Inspector General.

As part of our response, enclosed please find a copy of a draft of proposed legislation to authorize employees within the Railroad Retirement Board's Office of Inspector General, who investigate violations of Federal criminal law, to exercise various law enforcement authority. This proposal was communicated to the Congress in a letter from the Secretary to the Board, Railroad Retirement Board, as recorded in the Congressional Record-House, May 22, 1989, H2054:1244, and Congressional Record-Senate, S6209:EC-1217.

Following are our responses to the questions contained in your inquiry; our answers are keyed to your question numbers.

A. The Railroad Retirement Board's governing statute does not permit Inspector General personnel to carry firearms.

B. Since it is necessary to be prepared to act as a Deputy U.S. Marshal upon being authorized in specific RRB cases, the Railroad Retirement Board, Office of Inspector General has undertaken a firearms safety and qualifications program. RRB-OIG Special Agents are scheduled to qualify on a quarterly basis; qualifications take place on State Police and local FBI standard firearms ranges, and are supervised under state-registered and approved firearms instructors. It has been OI practice at qualifications to instruct and discuss with Special Agents safe handling and appropriate use of firearms. Highly experienced and certified FBI and former FBI Special Agents have participated in these sessions. In further support of this practice, OI has had two of its Special Agents trained as certified firearms instructors at the Federal Law Enforcement Training Center, Marana, Arizona, and subsequently approved and registered as firearms range instructors by the State of Illinois. Firearms are securely stored by the Office of Investigations management before and immediately after qualifying sessions.

The Office of Investigations (OI) is designated as a Federal criminal justice law enforcement agency as defined in 28 C.F.R. 203 by the Department of Justice.

The Office of Investigations believes it is vital to its mission that its Special Agents possess full law enforcement authority. The Inspector General believes that the Office of Inspector General should be fully involved in criminal investigations and that the Office of Investigations investigators should be afforded those law enforcement tools necessary to accomplish the mission.

One out of 5 OIG-OI subjects have been identified in Railroad Retirement Board criminal cases as having multiple arrest records including convictions for murder, theft, rape, sodomy, arson, unlawful use of weapons, assault, resisting arrest, narcotics violations, and assaulting police officers. Each subject must be interviewed. Due to the environment in which each of the subjects is located, (i.e., remote rural areas, urban high crime areas, including areas of known narcotics trafficking) and their established criminal records, each subject represents a potential threat to the safety of the Special Agents in the field. In addition, it is important to keep in mind that OI Special Agents conduct their criminal investigations throughout the United States, usually far from their base of operations at RRB Headquarters in Chicago, Illinois; thus, the capability for immediate assistance from agency personnel in situations of significant risk or danger is considerably reduced. This higher degree of self-reliance by OI Special Agents again indicates a reasonable and compelling need for full law enforcement authority.

Since its inception in 1986 (with the first full year of OI activity in 1987), through January 31, 1990, OI has achieved:

161 criminal convictions

124 indictments/informations

$3,538,368 in fines, restitutions and recoveries

1,015 U.S. Attorney, Referrals

Clearly, the OI has been highly active in conducting its criminal investigations; however, OI believes that to be fully effective and efficient, it needs full law enforcement authority. The OI caseload has now exceeded over 2,000 criminal matters, considerably increasing the number of cases involving a significant element of risk or danger to OI Special Agents. Thus, the issue of full law enforcement authority has grown more acute as OI grows towards a fully-developed investigative organization.

C. The lack of full law enforcement authority, including firearms authority, has caused certain problems, and has placed OI Special Agents in actual or potentially dangerous situations. Some specific instances include:

The subject of an RRB investigation in Arizona was suspected of illegally converting nearly $22,000 in Railroad Retirement Board benefit funds to his own personal use. Shortly before the subject was to be interviewed by Office of Inspector General Special Agents, the subject was shot and killed while attempting to commit the burglary of an occupied residential dwelling at night.

In another RRB investigation, in West Virginia, just prior to being interviewed by OI Special Agents in connection with the illicit receipt of over $50,000 in RRB funds, the subject was shot and killed while participating in a narcotics transaction. This subject had no previous known criminal records; thus, the OI case agents might have unknowingly placed themselves in an encounter with an individual actively trafficking in narcotics with its related threat of violence.

The subject of an investigation in Missouri is suspected of fraudulently obtaining Railroad Retirement Board unemployment insurance benefits. In March, 1988, Special Agents of the Railroad Retirement Board, Office of Inspector General attempted to locate and interview the subject. In the course of the investigation, information was obtained for the Missouri State Highway Patrol that there was an outstanding warrant for the subject and that the subject should be considered armed and dangerous. Had the subject been encountered by OI Special Agents prior to receipt of this information, it is possible that, lacking full law enforcement or firearm authority, they could not have fully met all the exigencies of the situation.

In each of these cases, based upon information known at the outset of the investigation, they would not have met the criteria for submission as deputization requests to the Department of Justice, and yet in each of these cases, OI Special Agents could have been placed at significant risk in encounters with the subjects. Full law enforcement authority, including firearm authority, would have provided the Special Agents with the tools necessary to meet any aggressive or unlawful act on the part of the subject.

D. The Office of Inspector General hires persons with investigative skills to fill its criminal investigator positions. The Office of Personnel Management standard specifies that criminal investigators have a primary knowledge of investigative techniques and be skillful in such activities as maintaining surveillance, performing undercover work, making arrests, and taking part in raids. Throughout their careers, criminal investigators receive various training and have access to specialized equipment related to conducting investigations.

The OIG-OI at RRB is a participating agency at the Federal Law Enforcement Training Center in Glynco, Georgia. All series 1811, criminal investigators of OIG-OI are required to successfully complete an eight-week Criminal-Investigator Training Program which includes among other things the training and qualification in the use of firearms. This is the same training agents of the U.S. Secret Service, FRS, Customs, etc. received at Glynco, Georgia. In fact, our agents are interspersed among these agencies trainees for training purposes.

In addition, OIG-OI Special Agents already routinely receive three weeks of specialized Inspector General training at FLETC within their first year of employment.

Therefore, there would be no additional training or expenses necessary if firearm authority were granted to OIG-OI personnel. Additionally, all OIG-OI agents are required to re-qualify in firearms training every 3 months in conjunction with the FBI and Illinois State Police.

E. The Office of Inspector General at the Railroad Retirement Board would respectfully contend that limiting an agent's authority to carry a firearm to only those instances when "danger is expected" is an onerous and unworkable restriction. As we have already illustrated it is practically impossible to know, in advance, which situations will prove to be "dangerous." With over 2,000 active criminal matters, it is not feasible for OI to have to predict the degree of danger inherent in any one case, or to be involved in a continuing stream of deputization requests. The Inspector General would agree that certain restrictions should be imposed on such authority. The proposed legislation would limit the agents authority to carry a firearm to only those field investigations within the scope of the agent's duty that fall within the jurisdiction of the Inspector General at the RRB, and only while on official duty.

In addition, the proposed legislation would not automatically grant authority to OIG agents to carry weapons. Rather, only those qualified agents explicitly designated by the Inspector General would be allowed to carry a weapon within the scope of their duty.

F. 1) The deputization process begins with the Special Agent who, after reviewing the facts of the case, concludes that the subject, or the nature of the case, involves a high degree of risk or danger to the Special Agent. The Special Agent then reviews the matter with his or her Supervisor. If the Supervisor concurs, a draft request is prepared and submitted to the Special Agent In Charge, who also reviews the facts of the case. The request also receives review by the Assistant Inspector General for Investigations. If approved, the Assistant U.S. Attorney handling the case is contacted; if the AUSA approves, a formal written request is submitted by RRB-OIG to the Deputy Assistant Attorney General, Washington, D.C. The Deputy Assistant Attorney General then refers the matter to the appropriate component(s) with the Department of Justice, and also submits a written inquiry to the U.S. Attorney's Office having jurisdiction, verifying the factual basis of the request and requesting the U.S. Attorney's Office to articulate the basis for their concurrence. DOJ staff members may also contact OIG managers to clarify or amplify certain issues in the case. A final review is then conducted. If approved, the request is forwarded to the U.S. Marshal's Service for further action, i.e. issuance of identification cards, oath of office, etc. If denied, a letter is sent to this office reporting the denial; no basis is given in the letter for the denial. All authorizations for deputization status expire on June 30 of each year; each authorization must then be renewed by the same process.

The OIG believes that the deputization process is cumbersome and inefficient, resulting in the delay of just those criminal investigations that call for the most effective and timely response. The deputization process requires the time, attention and involvement of Special Agents, Supervisory Special Agents, agency managers, U.S. Attorneys, their Assistants and staff, staff members of the Department of Justice, as well as staff members of the U.S. Marshal's Service, both in Washington, D.C. and at the local level; thus a considerable amount of federal government resources are utilized that could more efficiently be spent on the timely and effective investigation and prosecution of violators of federal law. In addition, the lengthy review process has both a debilitating effect on criminal investigations that must be put "on hold" pending a final response as well as an inhibitive effect on the referral of cases that would, on appearance, be eligible for consideration for deputization, yet which an agency would be reluctant to delay due to concern over possible loss of evidence, unavailability of witnesses or subjects, etc. As currently constituted, the deputization process is viewed by investigative personnel more as an impediment rather than a mechanism to assist in the conduct of an investigation.

F. 2) The deputization process has taken an average of six months. Interestingly, one request was approved in thirty (30) days; another took one year. Both subjects demonstrated a propensity towards violence. In the first case the subject was residing in a house believed to be the scene of "crack" cocaine trafficking and had shown abusive behavior towards the RRB annuitant. In the second case, the subject had previously been arrested for murder. Both cases certainly warranted deputization; however, the unequal length of time for final approval is obviously baffling.

F. 3) Since 1988, the OI has submitted nine (9) requests for deputization.

Five (5) have been approved, three (3) have been denied; one (1) is still pending. No reason for denial is furnished by the Department of Justice in their written response.

F. 4) There is no formal reconsideration process; however, it is the understanding of this office that a request for reconsideration may be submitted.

F. 5) It is not known to this office what circumstances would be sufficient for DOJ to authorize "blanket" approvals for deputy marshal status; however, in October, 1987, this office submitted such a "blanket" request. The request outlined the nature of OI cases and the circumstances attending them, including the criminal records of subjects under OI investigation. This request was denied by DOJ on November 3, 1987. No basis for the disapproval was given.

F. 6) In two recent OI cases, the deputization request was fully supported by the AUSA handling the case; nevertheless the requests were not approved. The AUSA's had not been notified of the denial by DOJ, and one has since approved a request for reconsideration by this office. The second matter has been closed.

In regards to your concern that lack of authority to execute judicially approved search and arrest warrants may impede OIG efforts, we fully share that concern.

Currently, the law enforcement authority of criminal investigators in the Office of Inspector General is limited. For example, the investigators may not request the issuance of search warrant pursuant to authority granted by the Department of Justice. Similarly, the investigators are not authorized to execute a search warrant when issued.

Such limitations require OIG criminal investigators to conduct investigations jointly with the Federal Bureau of Investigations, United States Secret Service and other authorized agencies. These arrangements, however, present serious shortcomings. First, waiting for assistance from an authorized agent too often has a chilling effect on or compromises an investigation. Law enforcement priorities differ among agencies. Consequently, an investigation involving this agency's programs may have a high priority for the Inspector General but the case might not have the same priority for another law enforcement agency. Manpower constraints and work load factors further enter into the feasibility of working a joint case. Additionally, since our agents are headquartered at Chicago, Illinois, travel delays and extended coordination of cases renders the handling of cases difficult and sometimes impossible.

In addition, this type of limitation tends to make other agencies reluctant to participate in an important investigation with an OIG, knowing that the investigation may be delayed for up to six months while awaiting appropriate authorizations. Thus, the mission of the OIG is compromised on a practical level.

Regarding the third point contained in your inquiry, this Office of the Inspector General has not been involved in any protective services.

Regarding your concern over limitation of Inspector General authority, at the time of this writing, the ramification of the Kmiec opinion have not hindered the Inspector General's ability to investigate and audit instances of waste, fraud and abuse within the programs administered by the Railroad Retirement Board. However, RRB-OIG is greatly concerned by the impact that the Kmiec opinion has had on the IG community as a whole.

I trust that this information proves of benefit to you and the other members of the Committee, and helps lead to a successful resolution of this matter.

Sincerely Yours,

William J Doyle III

William J. Doyle III
Inspector General

Enclosures

U.S. Small Business Administration
Washington, D.C. 20416

**OFFICE OF THE
INSPECTOR GENERAL**

MAR 7 1990

Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Mr. Chairman:

Thank you for your letter of February 2, 1990 regarding the problems faced by criminal investigators of the Offices of Inspector General as a result of not having traditional law enforcement authorities. As you are aware, this issue has been of some interest during the past two legislative years and was raised at your Committee's hearing on Inspector General (IG) problems this past fall.

There is currently a bill, S.2080, which was introduced on February 6, 1990, by Senators Boschwitz, DeConcini and Coats, which would provide this much needed authority to the establishment Offices of Inspector General (OIGs). The co-sponsors of this bill were Commissioners on the National Advisory Commission on Law Enforcement and used the data gathered by the Commission as the basis for the legislation. A companion bill, H.R. 4149, was introduced by Congressman Harley Staggers on March 1, 1990, so the timing of your inquiry is most appropriate considering the important role your Committee plays in matters pertaining to the IGs.

In response to your questionnaire, we submit the following information:

Question A. Does your agency's governing statute permit IG personnel to carry weapons? If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.

RESPONSE: The governing statutes of the Small Business Administration (SBA) have no language which could be used to permit IG special agents to carry firearms. The only authority available to this office is the authorization as Special Deputy US Marshals, under the guidelines of the Attorney General. We currently have over half of our agents deputized on various active cases. Some agents are currently deputized on as many as seven cases.

Question B. If your answer to question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?

RESPONSE: Although there is no specific agency authority regarding firearms, the position classification and description of the criminal investigator series (GS\GM 1811) requires that they be proficient with firearms. In addition, the Attorney General guidelines for special deputation require that an agent be properly trained and qualified with firearms before deputation will be granted.

All OIG special agents, as part of their basic training, attend the Criminal Investigator School at the Federal Law Enforcement Training Center (FLETC). This is the same training given to criminal investigators of the Secret Service, US Customs Service, Internal Revenue Service, Bureau of Alcohol Tobacco and Firearms, US Marshals Service and all other agencies with the exception of the Federal Bureau of Investigation (FBI) and the Drug Enforcement Agency, which have separate facilities.

The firearms training OIG agents receive is extensive and includes courses in basic marksmanship, firearms safety rules and regulations, judgment pistol shooting/instinctive reaction, practical pistol course, reduced-light course of fire, shotgun course, situational response, and weapons maintenance and cleaning. In order to be given a passing grade, the student must demonstrate better than a 70% accuracy rate and no lower than a 100% score in judgment shooting. In addition to the formal training, our agents qualify on the modified practical pistol course on a semiannual basis.

This office has had a written firearms policy since December 1986. It specifically defines the type of weapon which can be carried when deputized, as well as the acceptable type of holster. It provides guidance on the proper method of carrying a weapon and cautions the agent against unnecessary display of the weapon. It specifically prohibits the use of "back-up firearms" and against carrying the weapon off-duty.

Our written policy concerning the use of firearms mirrors that which is in effect in most federal agencies, particularly the Department of the Treasury and the Department of Justice, and includes provisions that a firearm may be discharged only as a last resort when there is danger of loss of life or serious bodily injury to the agent or another person. There are other specific instructions and prohibitions contained in these guidelines which may be helpful in your review; accordingly, we are attaching a copy of the current version for your information.

Question C. If your lack such firearms authority, please describe any problems this has caused in performing your mission. Please provide any specific instances where inspector general personnel may have been unnecessarily placed in danger as a result.

RESPONSE: To attempt to categorize the problems encountered by OIG agents while conducting criminal investigations as being related solely to the carrying of firearms is inaccurate and raises an unnecessary emotional issue, particularly for those individuals unfamiliar with the investigatory process. In response to this question, we will address authority for execution of search and arrest warrants along with the firearms issue, as all are considered essential "tools of the trade" by professional investigators. Here at SBA OIG, we believe that the lack of these essential authorities has had a negative effect on: investigative efficiency and effectiveness; agent safety; employee recruitment and retention; and morale.

Efficiency and Effectiveness

The inability to complete the basic tasks which are standard operating procedures in other federal law enforcement agencies has had an adverse effect on the conduct of criminal investigations involving millions of dollars of government funds and contracts. As we will explain later, this Office has attempted to effectively use the deputation process, but our investigators have been frustrated over the time and effort it takes to obtain approval and its resultant delays and lost opportunities.

Perhaps the most timely example of this type of inefficiency is an case which involves a Small Business Investment Company that received $6 million in government funds and has applied for $1 million more. We are in the 12th week of delay after a decision was made by the prosecuting attorney to serve a search warrant. Since there is no other agency involved, deputation is necessary before the warrant can be served. Although the Assistant United States Attorney (AUSA) and the US Attorney have made personal pleas to the Justice Department in Washington, the deputation request has not yet been approved. A cooperating witness who had agreed to assist the investigators in a consensual monitoring situation prior to the execution of the warrant has, on the advice of counsel, now changed his mind about cooperating, citing the delay as his reason.

Since the Government's case will rely heavily on the evidence hoped to be secured by the warrant, every day that passes increases the chance that the subject will find out he is the target of the case and destroy the evidence. In this instance, the lack of proper authority places in jeopardy the Government's chances of recovering over $7 million, as well as a felony conviction.

This case is not unusual given the wide spectrum of investigations we conduct. Opportunities for operations of this type frequently come up unexpectedly, as do situations calling for consensual monitoring, surveillance, witness protection and undercover operations. Our only alternatives under the present circumstances are to attempt to get deputation, try to get help from some other agency or forgo the opportunity and lose the case, none of which are desirable from an effectiveness standpoint. Even in those cases where we are working a joint investigation with one of the "traditional" law enforcement agencies, we burden and endanger those agents who are armed and ready to go while we have our proverbial ballpoint pen handy.

The concept of getting assistance for a particular process, such as a search warrant, arrest warrant, or just to do an interview in a high-crime area, is another particularly inefficient process. Not only do we encounter delays in getting assistance due to a heavy workload in all law enforcement agencies, but further time is wasted in briefing an assisting agent not familiar with our Agency programs, violations, etc.

Agent Safety

Perhaps the most basic reason for granting the authority to carry a firearm is the ability of an agent to protect him/herself as well as those who might become involved in our investigations. A criminal investigation is intrusive by nature. Agents cannot avoid threatening situations when conducting investigations in high-crime areas or conducting confrontational interviews with persons with violent tendencies.

One such situation occurred in Georgia, where one of our agents had to interview the subject in the preliminary stages of a loan fraud case. The agent met the subject at a parking lot and, at the subject's request, got into the front seat of the subject's pickup truck. The individual then drove off, and continued to drive the agent around rural roads for a period of six hours. Fortunately, the agent was one of our most experienced and handled the questioning so as not to appear threatening or to provoke the subject.

Shortly after this incident, the same subject and another man severely beat an FBI agent who was working undercover in the subject's stolen car operation, a fact not known to the SBA agent at the time of our interview. This individual served time in a federal penitentiary for the assault on the FBI agent and shortly after his release was murdered in a drug-related incident.

This is hardly an isolated situation faced by IG agents. Subjects of IG investigations are also engaged in criminal activities such as narcotics distribution, weapons trafficking, organized crime or have criminal histories for violent crimes such as murder, assault, robbery, rape, etc. Government loan and related programs are used for money laundering as well as to give an air of credibility to an otherwise corrupt enterprise. The individuals who engage in these operations are used to dealing with law enforcement agents who are armed and in certain situations will act accordingly. This unknown and unexpected danger poses a threat to the safety of any law enforcement officer, particularly one who is unable to protect him/herself.

Examples of potential incidents of which our investigators are knowledgeable:

- In California, the subject of a $400,000 fraud case was arrested and subsequently convicted of the murder of his wife and son. The murders were carried out in order to collect insurance after the funds stolen from the government were depleted.

- In New York, OIG agents discovered that millions of dollars have been illegally obtained by members of an organized crime family and are being used to fund illegal activities. Three subjects in the case were indicted for the murder of a city detective during a surveillance of the business premises.

- In the Virgin Islands, an individual suspected of murder was indicted on narcotics charges along with two counts of theft from SBA as the result of a fraudulent $80,000 loan. This investigation was conducted solely by an OIG agent since there was no other federal assistance available. Deputation was necessary and took five weeks to obtain, during which time the suspect fled to Florida, causing additional delay in locating him.

- In Texas, an 8(a) contractor, under investigation for submitting false invoices in connection with a government contract, jumped bail after being indicted on a narcotics distribution charge. The subject had a previous arrest for attempted murder and was listed as "armed and dangerous" by the US Marshals Service.

- In Tennessee, the subject of a $650,000 loan fraud case was charged with nine counts of narcotics distribution and was identified by Federal prosecutors as the drug "kingpin" in a three-state area. According to the US Attorney, the subject had been a major narcotics dealer for eight years.

- In Georgia, the subject of an investigation involving a false statement on a loan application was arrested in an unrelated matter for assaulting a US Marshal with a weapon.

Recruitment, Retention and Morale

One of the findings of the National Advisory Commission on Law Enforcement was that the most significant problems in the IG community were related to the lack of law enforcement authority. The Commission found that in three years, one sixth of OIG criminal investigators transferred to an agency that had full law enforcement authority. In focus group interviews, IG agents expressed great frustration at not being able to utilize the training they received, at being limited in their options while conducting investigations, at being placed in dangerous situations and being considered "second class citizens" by their peers in other agencies. We have also experienced some of this frustration, including the recent loss of a promising young agent who took a two-grade reduction to transfer to another agency which offered the full range of authorities.

The most significant impact is on the younger agents. The inability to offer the full range of authorities hinders competition with larger, more well known agencies. It is also expensive for us to expend resources training them at FLETC an then have them move to another agency. Once they complete their training, they are amenable to offers from other agencies since they can then utilize the skills they have been taught. Since most agencies train at the same facility, when we loose an agent the gaining agency is getting an agent in whom they do not have to invest training funds.

This situation may have long term negative effects on the IG community as a whole. In our situation, only 12% of our field agents are below thirty, while 48% are in their late forties and will be eligible for retirement in the next 5 years. This situation reflects an unfavorable condition in recruitment and retention and could have disastrous long term effects on organizational stability.

Question D. What additional training and expenses would be included if firearms authority was provided inspector general personnel?

RESPONSE: We would not incur any additional training or expenses if such authority were provided. As we stated above, all agents already attend a required training program which includes firearm handling, safety and qualification. In addition, we require agents to qualify on a semiannual basis, and are not in need of any additional equipment.

Question E. What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances where danger is expected?)

RESPONSE: Our firearms policy goes to great lengths to advise the agent that carrying a firearm is a responsibility that is not to be taken lightly. We have some specific restrictions about the unnecessary display and carrying of a weapon while in an office situation, such as in an SBA or other agency office. There are strict guidelines concerning transporting a weapon on an aircraft in compliance with Federal Aviation Administration regulations. There is also a section which describes specific forbidden activities for which an agent can be disciplined or removed from employment. Essential criteria used in selecting an individual for an agent's position are maturity and judgment. We believe that selecting and training good people and continually reinforcing our standards of responsible conduct will prevent any untoward incidents.

Question F. It has been suggested that deputation as Assistant US Marshals may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation.

RESPONSE: It has been the policy of this Office to attempt to utilize the deputation process in full compliance with the Department of Justice guidelines. The criteria for applying for deputation includes anticipation of a danger, situations where there is theoretically no other viable assistance from another law enforcement agency, and where it is necessary for the successful completion of a criminal investigation. In recent weeks, we have been verbally advised that the request must also contain a certification that the investigation is being legally conducted under the restrictions of the "Kmiec" opinion.

Question F1. What is the procedure for obtaining authorization for appointment as a Special Deputy US Marshal for your personnel? Which officials within your agency of at the Department of Justice must approve such deputations?

RESPONSE: Our current procedure for obtaining a deputation is for a memorandum outlining the points listed above, including the concurrence of the local AUSA, to be prepared by the agent's supervisor, passed through regional and headquarters management for the concurrence of our Assistant Inspector General for Investigations (AIGI), for the signature of the IG. The request is then forwarded to the Deputy Assistant Attorney General, Criminal Division, who sends it to the Senior Associate Director of the Office of Enforcement Operations, where it is assigned to an analyst. After the analyst completes the initial review, a two-page questionnaire is then sent to the assigned AUSA for a confirmation of the facts. Upon return of the questionnaire, the analyst makes a recommendation and forwards it through channels back to the Associate Attorney General for a final decision. That office then notifies the US Marshals Service, which in turn notifies the agency of the decision and sets up an appointment for the agent(s) to be sworn in.

Question F2. On average, how long does the process for reviewing requests for these appointments take?

RESPONSE: On average, our deputation requests have been taking two months for approval after receipt by the Justice Department. The range of approval time has run from two weeks to five months during the past year. We currently have four requests, two initial and two renewals (from June 1989) which have been pending an average of seven months. In two of those pending requests, the delay has been caused by the AUSA not completing and returning the questionnaire.

It should be noted that the questionnaire has been in use only since May 1989, when the Justice Department revised it's procedures to "streamline" the process. The result has caused more confusion and delay with the process, and we have had two AUSAs refuse to endorse deputation requests because of the additional paperwork burden it imposed on them.

Question F3. How many requests for deputation have you sent to the Department of Justice during the last year? How many have been denied? For what reasons?

RESPONSE: In the last year, we have sent deputation requests for 61 agents to the Department of Justice for approval. This number represents the number of times our agents were to be deputized and not the total number of agents that are deputized. In many instances, more than one agent is deputized on a particular case and some agents are deputized on numerous investigations. For example, two of our agents are currently deputized for seven different investigations each. Sixteen of our 25 field agents are deputized for one or more investigations.

Of 61 deputation requests, only nine have been denied for various reasons. In five of the cases, circumstances of the case changed during the processing of the paperwork, such as the subject was arrested on other charges or the AUSA declined further investigation. In the remaining four cases, the fact that another agency with law enforcement authority was available to assist, if needed, was cited as the main reason for denial. We accept, but do not necessarily agree with, the reasoning in all of these cases. However, we do believe that our low declination rate reflects our judicious use of the process, and that the significant number of our agents who have been approved reflects a definite need for the authority on a full time basis.

The primary weakness in this process is the requirement that the agent anticipate danger far enough in advance so as to begin the process described above. In reality, danger can manifest itself at any time during the conduct of an investigation and the agent would have no way of predicting it. The examples above illustrate the type of situations which place agents in danger without advance warning. It should also be pointed out that our agents, while properly deputized, have executed both search and arrest warrants on numerous occasions without mistake or mishap.

Question F4. Is there any avenue for reconsideration of denial of a request for deputation?

RESPONSE: As far as we know, there is no avenue for reconsideration of a denial of a deputation request. We have had some incidents where the AUSA or the US Attorney have personally appealed to the Department of Justice for either a reconsideration or an expedited deputation. In only one incident was the request for an expedited deputation granted in a critical situation. In the others, the appeals were denied.

Question F5. I have been informed that "blanket" authorization was granted to criminal investigators of the Department of Interior for purposes of investigating Bureau of Indian Affairs matters. Under what circumstances are any such "blanket" approvals granted? How many have been requested and how many have been granted since January 1, 1990?

RESPONSE: The "blanket deputation" you described is only one of three we are aware of in the IG community. During the period prior to May 1989, the deputations were reviewed by three separate sections in the Criminal Division. We inquired of some of the attorneys in the Fraud and Public Integrity Sections as to the feasibility of requesting a blanket deputation and were told the guidelines only called for a case-by-case application.

We are aware, however, that the Department of Labor Inspector General, Office of Labor Racketeering, was given a blanket deputation for their investigations, presumably due to the organized crime activity in their jurisdiction. We believe the Department of Health and Human Services may have received such authorization for some of the drug licensing investigations they were conducting prior to a Department of Justice opinion which questioned their investigative jurisdiction in this area.

We have been informed that the only blanket deputation granted by the Department of Justice since January 1, 1990 was for the agents in the Department of Justice Office of Inspector General. We were informed that the Attorney General authorized this deputation during late January or early February and based his decision on the fact that many of the federal employees to be transferred to the OIG presently carry firearms. Although we asked for a copy of this memorandum, we were told it was stamped "for department use only" and could not be made available to us.

If true, it is difficult to see how a blanket deputation could be justified under the existing guidelines or, if allowable, then there would not appear to be any reason why similar authority should not be granted to other IGs.

Question F6. Are requests that agents be deputized ever denied by the Department of Justice even though they have been requested by the pertinent United States Attorney's Office? For what reason would the Department of Justice override the recommendation of a United States Attorney's Office?

RESPONSE: See responses to Questions F3 and F4.

Question F7. How long does a Marshal's appointment last? What is the procedure for renewal of a deputation? How long does this process take?

RESPONSE: A US Marshal deputation usually lasts 6 months to a year, depending on the expected duration of the investigation. All deputations, regardless of when they were granted, must be renewed every June 30th. The process for renewal is the same as an initial request.

Question. I am concerned about reports that audits and investigations are also impeded by the perceived or actual lack of authority to execute judicially approved search and arrest warrants. Should this power be given to inspector general personnel?

RESPONSE: On May 12, 1987, the Attorney General approved our request for authority to request and execute search warrants under Rule 41, Federal Rules of Criminal Procedure. Although we have the authority to execute the warrants, we still have to go through the deputation process to get the authority to carry firearms and make arrests that might result from the search and to protect our agents during the execution of the warrant.

As with all deputation requests, we have experienced frustration and lost opportunities. In one particular case, a deputation request was made in order to serve a warrant on a Washington, DC business in a joint investigation with another agency, Defense Criminal Investigative Service (DCIS). The request was denied because a Justice official took the position that there was no compelling danger, although the neighborhood was identified as extremely dangerous by Metropolitan police. The official also reasoned there was no need since DCIS had firearms authority. Although we pointed out that DCIS did not have arrest or search authority, we were denied the necessary deputation. To avoid endangering the agents, the warrant was not served.

It took approximately one and one-half years of additional investigation to gather enough evidence through other methods to obtain indictments. which we estimate could have been obtained in a much shorter time span had we been allowed to execute the warrant.

The use of search warrants effects only the gathering of evidence in a criminal investigation. It would not effect the audit process in this office.

I also believe it appropriate to point out that the authorities being sought by OIG criminal investigators are regulated and approved by the Justice Department. In accordance with internal procedures, no investigator can obtain a warrant to search or arrest without the concurrence of an AUSA and the approval of the Court. The power to arrest without warrant is limited to any offense committed in the presence of the agent and felonies where the agent has reasonable grounds to believe a felony is being committed or has been committed by the person to be arrested. All OIG agents receive training on these procedures during the basic training course at FLETC.

Question. I would appreciate receiving a complete description of protective services, if any, furnished by IG personnel for the head of your agency during the past 5 years, including some estimate of the personnel years expended on this purpose, and the authority for providing such services.

RESPONSE: This Office has provided no protective services for the head of the agency at any time.

Question. The Committee has heard testimony form a number of inspectors general concerning the limitations the Justice Department has sought to impose on IG audit and investigative activities in two memorandums issued by the Office of Legal Counsel (particularly "Kmiec I" Dated March 9, 1989). Please provide the Committee with any comments you may have on the impact of these memorandums on your ability to complete your mission.

RESPONSE: In a recent memorandum to the Department of Justice, my Counsel provided an opinion with regard to this Office's position regarding the "Kmiec" opinion. In our situation, we do not feel that we are directly affected by the opinion as the authority to conduct investigations relating to the programs of this Agency were statutorily transferred from predecessor investigative units upon the creation of this office under the Inspector General Act of 1978. However, we are concerned about the specific language in the "Kmiec" opinion regarding "only government employees and funds" when used in the context of investigative jurisdiction of the OIG. There are many significant violations of law that relate to agency programs and processes which, at the time of the violation, do not involve any government employees or funds. For example, under both Titles 15 and 18, false information regarding a person's status as an economically or socially disadvantaged individual in an application for 8(a) status is a criminal violation which has a direct effect on the Agency operation although no funds are involved. While it is true that the motive for such activity is usually the funds generated by the resultant government contracts, the law does not require that such funds actually be paid for a violation to occur.

It is evident to us, that unless clarifications are made to the "Kmiec" opinion, either through legislation or action by the Justice Department, confusion and uncertainty will continue to hamper the work of OIGs throughout the government and further impede our effectiveness.

We thank you for the opportunity to assist in your study of problems facing the Inspector General community. We hope that your Committee recognizes the need for positive action to ensure that the Congressional mandate in the Inspector General Act will continue to be met and that the public will have confidence in the integrity and efficiency of its programs.

If you need further information or have questions about this response, please contact me or Steve Marica, AIGI, on 235-3870.

Sincerely,

Charles R. Gillum
Inspector General

Enclosure

CHAPTER 333

FIREARMS

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CHAPTER 333

FIREARMS

SECTION 1. GENERAL

1-1. Purpose. This Bulletin sets forth the policy concerning the use of firearms by OIG Special Agents (SAs) and the procedures to be used in qualifying with a firearm, carrying a firearm, use of a firearm, and the reporting of its use.

1-2. Authorization to Carry Firearms. SAs of the SBA OIG Investigations Division currently do not have statutory authority to carry firearms. Authority to carry firearms is limited only to those SAs having current status as Special Deputy U.S. Marshals.

Statutory authority for carrying firearms by federally deputized SAs of the OIG is found in Title 18, U.S. Code, Section 3053, which states:

> United States marshals and their deputies may carry firearms and make arrests without warrant for any offense against the United States committed in their presence, or for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.

In addition, Title 28, U.S. Code, Section 570 states:

> A United States marshal and his deputies, in executing the laws of the United States within a state, may exercise the same powers which a sheriff of the state may exercise in executing the laws thereof.

Only SAs who are sworn Deputy U.S. Marshals maybe authorized by the Assistant Inspector General for Investigations (AIG/I) to carry firearms while on official duty as stated under the terms of the special deputation.

The AIG/I or a Regional Inspector General for Investigations (RIG/I) may prohibit an SA from carrying a firearm at any time for any reason. The AIG/I or RIG/I may also require an SA to surrender his/her firearm at any time for any reason.

1-3. Use of Deadly Force. It is the policy of this Office that SAs shall use the minimum amount of force necessary to discharge their assigned responsibilities. Use of deadly force is justified only as a last resort, when all lesser means have failed or cannot reasonably be employed and when, in the considered opinion of the SA, there is a danger of loss of life or serious bodily injury to the SA or to another person.

1-4. Familiarity with Firearms Policy. Immediate supervisors are to assure that each SA possesses and is familiar with the most recent issuance of this firearms policy.

SECTION 2. TRAINING AND EQUIPMENT

2-1. Training and Qualifications. Prior to carrying or qualifying with a firearm, SAs must have received appropriate training in weapons use and safety from a recognized federal training establishment (e.g., military, Federal Law Enforcement Training Center, FBI Academy) or from an established state or local law enforcement agency, and have qualified as per their guidelines.

All firearms-trained SAs must qualify with their assigned weapon on a semi-annual basis. To qualify, the SA must earn a score of 210 or better on the Modified Practical Pistol Course.

SAs who do not have current deputation status may have weapons assigned to them, but such weapons will be used only when qualifying.

2-2. Authorized Equipment. All SAs shall adhere to the following policies concerning equipment usage:

(a) All firearms carried during normal duty assignments shall be U.S.-made .38 or .357 caliber revolvers. Except with the approval of the AIG/I, only firearms issued by the Investigations Division are to be carried. SAs may not carry personally-owned firearms while on duty.

(b) Trigger shoes are prohibited on all official firearms. Any adjustment and/or repair to an official firearm should be done only by authorized personnel. (Installation of grips or grip adapters is not considered an adjustment.)

(c) All ammunition used for qualification purposes will be .38 caliber, either wadcutters or new (not re-loaded) +P 95 or +P 110 grain ammunition. The standard ammunition issued to be carried shall be new (not re-loaded) government-schedule, .38 caliber jacketed-hollowpoint +P 95 or +P 110 grain ammunition.

(d) No non-lethal type weapons, such as electric "stun guns" or chemical agents such as "mace", will be carried.

(e) Other law enforcement equipment, such as handcuffs and bullet pouches, will be issued as necessary. However, only those SAs who have received training in their use should be issued handcuffs. SAs may use speed-loaders as long as they are of a type compatible with issued weapons. SAs carrying speed-loaders should use them when qualifying.

(f) Firearms shall be carried in belt or shoulder holsters. The holster must be so constructed that it will safely retain the weapon. The holster shall be of such type and design as to not be conspicuous when worn under a coat, jacket or similar type apparel. Personally-owned holsters which meet the standards above may be used with the written approval of the SA in Charge (SAC).

2-3. Weapons in Special Assignments. While assigned to special projects, such as an undercover assignment, an SA may need the use of a firearm other than a .38 or .357 caliber revolver. Approval for use of such a weapon must be obtained from the AIG/I. The SA must demonstrate proficiency with the weapon by receiving appropriate training in use and safety by a recognized federal training establishment and be qualified in the use of the weapon as per established guidelines.

2-4. Safety Inspections. RIG/Is shall schedule at least one safety inspection each year of all government-owned firearms assigned in their region. The inspection shall be performed by someone competent in the inspection of firearms, such as a local range officer, a gunsmith, or an SA with expert knowledge of firearms.

SECTION 3. CARRYING FIREARMS

3-1. Obligations and Responsibilities. SAs are reminded that the authority to bear firearms carries with it the obligation and responsibility to exercise discipline, restraint, and good judgment in their use. Any unauthorized or untoward incident involving a weapon will be considered serious and subject to disciplinary action.

SAs must conduct themselves so as to preclude the possibility of accidental discharge of weapons. Moreover, SAs must not engage in any activity which might impair the confidence of the public in their judgment and professional ability. Activities specifically prohibited while armed include, but are not limited to:

(a) Horseplay;

(b) Practicing quick draw or other draw techniques in circumstances other than under formal training or qualification;

(c) Careless display of a weapon in public;

(d) Use of intoxicants in other than authorized situations;

(e) Use of medications or drugs which may impair on-duty judgment or ability;

(f) Carrying a weapon which has been modified in any way to eliminate safety devices; or

(g) Dry firing for any reason in locations other than approved range or armorer facilities.

Violation of SBA OIG's firearms policy or applicable federal or state laws is a serious offense. Persons violating these rules will be subject to disciplinary action. A violation may be sufficient grounds for removal.

3-2. Identification. SAs must carry appropriate identification (i.e., badge and credentials) at all times when carrying weapons unless engaged in an undercover or similar authorized assignment.

3-3. Off-Duty Hours. SAs are not authorized to carry firearms during off-duty hours. Firearms normally will be stored at the SA's office at the end of the work day. SAs are permitted to be armed while traveling between work and their residence when their assignments require them to be armed at the end of one work day or the beginning of the next day.

3-4. Display of Weapons. As a general rule, when a handgun is carried in the conduct of official duty, it is to be carried inconspicuously on the person of the SA, away from public view. Any unnecessary reference to the fact that the SA is armed should be avoided. It is incumbent upon each SA to utilize particular discretion when wearing a weapon in office space. SAs must keep in mind that office space may be shared with non-weapon carrying personnel; therefore, they should avoid any unnecessary display of weapons, holsters, or other law enforcement equipment.

A firearm should be drawn only when the SA has sufficient cause to expect it will be used and is preparing for its use. Shoulder weapons (shotguns, rifles, etc.) may be displayed as their use requires.

There are conditions under which a firearm may be drawn when there is not yet sufficient justification for its discharge. SAs are authorized to draw their firearms under the following conditions:

(a) When a person displays behavior threatening death or serious bodily injury to the SA or others;

(b) During an arrest, execution of a search warrant, or similar situation when there is reason to believe that armed and/or dangerous person(s) will be involved; or

(c) When information has been received that a person to be arrested, an occupant of the location on which a search warrant is to be executed, or a person involved in a similar situation is prone to resort to the use of firearms or other deadly weapons, has access to firearms or other dangerous weapons, owns firearms, has been known to have firearms in his or her possession or has a history of violence, or is believed to be armed and dangerous.

3-5. Storage. When not being carried, firearms shall be appropriately secured at all times. Firearms not issued to individual SAs shall be stored in a safe or cabinet having a three-position dial-type combination lock. Firearms issued to individual SAs may be stored in a secured (locked) area. If it is necessary to store a firearm at home, it should be kept under lock and key. The SA should consider inserting a lock through the open cylinder, thereby rendering the revolver inoperative. Also, ammunition should be stored separately from the firearm. An SA on travel status should keep his/her firearm on his/her person rather than leave it in a hotel room.

As a general rule, firearms and ammunition are not to be left in an automobile, even if the automobile is locked. However, if absolutely necessary, these items may be stored temporarily in a locked trunk, provided the doors are also locked and the keys are not left with a parking lot attendant or in the automobile. Weapons are not to be left in an automobile overnight.

3-6. Commercial Aircraft. Federal Aviation Administration (FAA) regulations (14 CFR Sections 108.11 and 108.21, Airplane Operator Security) provide information and guidance concerning the carrying of firearms and the transporting of passengers under the control of armed law enforcement escort(s). This material is summarized in FAA Advisory Circular 108-2 dated October 16, 1981.

In most cases, firearms will be transported in checked baggage or other appropriate containers specified by the airline. In such situations:

(a) The firearm will be unloaded;

(b) The baggage will be locked;

(c) The SA shall notify a responsible representative of the airline that a firearm is being transported in checked luggage. Such notification will be made in person at least one hour before scheduled departure. If an emergency situation precludes an hour's notice, notification is mandatory at the earliest practicable moment.

(d) The baggage will be transported in an area that is inaccessible to passengers. (This is the responsibility of the airline.)

The carrying of a firearm by an SA on board an aircraft should be limited to those instances where the SA needs the firearm accessible in the performance of official duty during the period the firearm would otherwise be placed in checked baggage and not returned until after deplaning, or in cases where the SA is on official travel and has no baggage to be checked.

If it is necessary that an SA carry a weapon on board an aircraft, on his/her person, the following FAA regulations will apply:

(a) The SA shall notify airline officials at least one hour in advance or, in case of emergency, as soon as possible before departure. The SA shall be guided by instructions from the airline officials as to the specific procedures to be followed.

(b) The SA shall make known his/her identity and the fact that he/she is carrying a weapon to airline personnel and other law enforcement officers who need this information.

(c) In the event of a disturbance aboard the aircraft, the SA shall take no action unless specifically requested by the flight captain.

(d) Armed SAs must not consume alcoholic beverages within 6 hours prior to the flight or during the flight.

SECTION 4. USE OF FIREARMS

4-1. Policy. In all circumstances involving the use of a firearm, SAs are to follow the policy and guidelines set forth below. These guidelines shall be followed regardless of the fact that state or local law may be more liberal in allowing their law enforcement officers to use firearms.

(a) A firearm may be discharged only as a last resort when, in the considered opinion of the SA, there is a danger of loss of life or serious bodily injury to the SA or to another person.

(b) Shots should not be fired if they are likely to endanger the safety of innocent bystanders unless firing is the only available means of preventing death or serious injury to the SA or to another person.

(c) Firing a weapon should be with the intent of rendering the person at whom the weapon is discharged incapable of continuing the activity prompting the SA to shoot.

(d) Warning shots are prohibited.

(e) Firing at a fleeing suspect will not be considered justified unless the SA has reasonable cause to believe that the person poses an imminent threat to the life of the SA or others. Use of firearms under these circumstances is considered a last resort.

(f) An order to stop should be given before a shot is fired in situations where such orders can be given without increasing the risk of death or serious bodily injury to the SA or another.

(g) Weapons are not to be fired at a moving vehicle except where the SA has determined that he/she must use deadly force because either his/her life or that of another is in imminent danger.

It is not intended that SAs take undue risk when danger threatens, but they must exercise good judgment at all times.

4-2. Reporting the Discharge of Firearms. When discharge of a firearm results in a death, injury, or serious property damage, the SA whose weapon was fired shall verbally notify his/her supervisor as soon as practicable. If the involved SA is unable to make such notification, any OIG SA with knowledge of the incident will notify the supervisor. The supervisor shall immediately, regardless of the time of day, report the shooting to the AIG/I, who will immediately notify the Inspector General (IG). The involved SA, or other knowledgeable SA, will also promptly notify the appropriate federal, state and local law enforcement authorities.

SECTION 5. INVESTIGATIONS OF SHOOTING INCIDENTS

5-1. Special Agent Responsibilities. The SA should prepare a memorandum detailing the facts and circumstances of the shooting. The memorandum is to be submitted through proper channels to the AIG/I within 24 hours of the incident. When the SA is incapacitated or legal action against the SA is foreseeable, the SA's supervisor prepares a memorandum of the shooting as soon as possible and submits it through proper channels to the AIG/I.

The memorandum should provide the following information at a minimum:

(a) Reason for use of a firearm and description of the incident;

(b) Date, time and place of the incident;

(c) Lighting conditions;

(d) Description of the firearm, type and number of rounds fired;

(e) Distance to the subject of fire;

(f) Injuries caused or received;

(g) Property damage;

(h) Description of SA's activity prior to the firearm discharge, e.g., investigation, protection, search, arrest, etc.;

(i) Names of any persons arrested and list of offenses charged;

(j) Description of the weapon used by the offender;

(k) Identification of all persons witnessing or involved in the incident and a summary of their observations or involvement; and

(l) Identity of any law enforcement agency investigating the incident (a copy of any resulting report of investigation is obtained as soon as possible).

The SA involved in such a shooting incident will be placed on administrative leave by the AIG/I pending the results of appropriate inquiries into the shooting incident. Unless the SA has already surrendered his/her weapon to an investigating law enforcement authority, the SA shall surrender his/her weapon to the supervisor. In all instances the SA shall cooperate to the fullest extent with any federal, state or local authority which is called upon to investigate the shooting incident.

5-2. OIG Investigation. Immediately upon receipt of the memorandum outlining the shooting incident, the AIG/I will dispatch an investigation team consisting of at least one Deputy Assistant Inspector General and one SAC to conduct a thorough investigation and prepare a report to the IG from the AIG/I. The purposes of the investigation are to establish the facts of the incident and to determine: (1) if the SA involved adhered to the SBA OIG firearms policy in effect at the time of the shooting; and (2) if OIG policy was adequate to cover the facts and circumstances of the shooting.

5-3. Reporting Other Incidents. Any other discharge of firearms, except during authorized training or qualification, or any instance of mishandling of a firearm by an SA shall be reported immediately to the SA's supervisor, who in turn shall report the incident through proper channels to the IG. Appropriate action will be taken based upon the facts of the situation.

United States Information Agency

Washington, D.C. 20547

INSPECTOR GENERAL

MAR 23 1990

The Honorable John Glenn
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510-6250

Dear Mr. Chairman:

This is in response to your February 2, 1990, letter to each of the presidentially appointed Inspectors General regarding whether general law enforcement authorities should be granted to Office of Inspector General (OIG) personnel.

In general, while most cases handled by this office do not require full law enforcement authority, I support the granting of such authority to OIG's so that those situations which involve physical danger can be handled in an appropriate and timely manner. Of course, all of these important authorities -- including arrest, search warrant, and firearm authorities -- must be judicially used, and only after full justification on a case by case basis. Therefore, it should be incumbent on each presidentially appointed Inspector General to establish appropriate procedures in their respective agency to safeguard these authorities once they are enacted. Answers to your specific questions follow:

QUESTION A: Does your agency's governing statute permit I.G. personnel to carry weapons. If your answer is yes, please specify and attach a copy of the statute, agency directive or other description of authority.

ANSWER: No. The United States Information Agency does not by statute or internal regulation specifically permit special agents in the Office of Inspector General (OIG) to carry firearms.

QUESTION B: If your answer to question "A" was yes, please describe the specific firearms training provided your personnel, and the restrictions concerning when a weapon may be worn. (For example, can such a weapon be carried off duty?) How essential is firearm authority to carrying out your mission?

ANSWER: N/A

QUESTION C: If you lack such firearms authority please describe any problems this has caused in performing your mission. Please provide any specific instances where inspector general personnel may have been unnecessarily placed in danger as a result.

ANSWER: The lack of firearms authority has in some situations delayed investigations because of the need to staff assistance from other law enforcement agencies for relatively routine interview, arrest, and search warrant activities. In addition, there are two instances we would like to highlight which deal with placing OIG personnel in danger because of the lack of firearms. The first involved an Agency employee, known to have an arrest record, who embezzled $35,000 in Agency funds to support his drug habit. After the theft was discovered, the employee vanished before he could be interviewed. Because the employee was believed to reside in a dangerous drug infested area of Washington, D.C., where the agent was likely to be the target of hostility, no attempt was made to locate and interview the employee. The second involved a former federal employee who was charged and sentenced for stealing government funds. The employee had to be processed by an unarmed OIG personnel contrary to all law enforcement safety procedures.

QUESTION D: What additional training and expenses would be included if firearms authority was provided inspector general personnel?

ANSWER: Minimal additional training and expenses would be incurred since all OIG special agents are presently required to successfully complete basic firearms training through the Federal Law Enforcement Training Center. Further, over 85% of our agents were previously employed by traditional law enforcement agencies which require extensive firearms training.

Semiannual requalification training would be included as an additional expense, as well as the cost of purchasing weapons and ammunition.

QUESTION E: What limitations would you place on such powers if granted? (For example, should wearing a firearm be limited to those instances when danger is expected?)

ANSWER: Strict limitations would be placed on carrying firearms. Certainly wearing a firearm would be limited to only those instances when danger is expected.

QUESTION F: It has been suggested that deputation as Assistant U.S. Marshal's may be an adequate alternative for those cases or types of cases where such authority is necessary. Please describe your office's history with respect to deputation.

ANSWER: This office has not made any requests for deputation to the Department of Justice. Those cases where such law enforcement authority was necessary were deemed to need timely resolution and it was believed that the procedure for obtaining deputation as Assistant U.S. Marshals was generally too cumbersome and time consuming to provide OIG with an adequate alternative for those situations.

Your letter also requested our comments with regard to three additional areas of concern. Our responses follow:

With respect to search and arrest warrants we believe that investigations are impeded due to the lack of authority to execute judicially approved search and arrest warrants, and that this power should be given to inspector general personnel.

Regarding protective services, OIG personnel to date have not been used to furnish protective services for the head of USIA. This function is currently being provided by USIA Office of Security personnel who are authorized to carry firearms for this purpose.

With respect to the Office of Legal Counsel (OLC) "Kmiec I" memorandum, the OLC decision has had an impact on our ability to complete our mission particularly as it applies to fraud and abuse in enforcing the Agency's visa program, since organizations issuing the visas have neither federal employees nor direct federal funding.

We appreciate the opportunity to answer your questions and hope we have been responsive to your concerns.

Should your or your staff have any questions please contact me at 485-1606.

Sincerely,

J Richard Berman

J. Richard Berman
Acting Inspector General